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In the

Supreme Court of the United States

JOHN A. RAPANOS; JUDITH A. NELKIE RAPANOS; PRODO, INC.; ROLLING MEADOWS HUNT CLUB; and PINE RIVER BLUFF ESTATES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

GREGORY T. BRODERICK
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

M. REED HOPPER
Counsel of Record
ROBIN L. RIVETT
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioners

QUESTIONS PRESENTED

1. Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extend to nonnavigable wetlands that do not even abut a navigable water?

2. Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress' constitutional power to regulate commerce among the states?

RULE 29.6 STATEMENT

Prodo, Inc.; Rolling Meadows Hunt Club; and Pine River Bluff Estates, Inc. are wholly owned by John A. Rapanos and Judith A. Nelkie Rapanos. Petitioner companies have no parent company and no publicly held company owns 10% or more of Petitioners' stock.

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PETITION FOR WRIT OF CERTIORARI

John A. Rapanos; Judith A. Nelkie Rapanos; Prodo, Inc.; Rolling Meadows Hunt Club; and Pine River Bluff Estates, Inc., respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 376 F.3d 629 (6th Cir. 2004), Appendix (App.) A. The opinion of the district court, filed on March 22, 2000, was not published but is included in App. B.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 26, 2004. That court's denial of the Petition for Rehearing En Banc was entered on November 2, 2004, App. C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The United States Constitution provides that Congress has power "[t]o regulate commerce . . . among the several states." Art. I, § 8, cl. 3.

The Clean Water Act (CWA) provides in pertinent part:

> Except as in compliance with this section and section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

> The Secretary may issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill materials into the navigable waters at specified disposal sites.

33 U.S.C. § 1344(a) (CWA § 404(a)).

> (5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.
>
> (6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water . . . .
>
> (7) The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(5-7) (CWA § 502(5-7).

Federal regulations define "waters of the United States" to mean:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
>
> (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
>
> (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
>
> (6) The territorial seas;
>
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

33 C.F.R. 328.3(a).

INTRODUCTION

Since 1988, John and Judith Rapanos have been embroiled in a dispute with the government over federal regulation of remote wetlands on their property. For more than ten years they

have had to defend themselves in court against an expansive interpretation of the Clean Water Act this Court has never sustained and arguably rejected in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*")—an interpretation that has created a stark conflict among the Courts of Appeals and which raises serious constitutional questions.

As a result of this dispute and a separate criminal suit, John Rapanos now faces certain jail time in a federal penitentiary, while in this civil case, both he and his wife are subject to fines and mitigation fees totaling several million dollars. The Rapanos are accused of filling wetlands on their property without a federal permit in putative violation of section 404(a) of the CWA.

STATEMENT OF THE CASE

Through their companies, the Rapanos own three parcels of land in Bay, Midland, and Saginaw Counties in the State of Michigan. *See* App. A2. These parcels are known as the Salzburg, Hines Road, and Pine River sites. *Id.* Although each site is separated from the nearest navigable water by intervening tributaries, as far as 20 miles, all three sites are alleged to contain jurisdictional wetlands under the CWA. *Id.* at A21. In February, 1994, criminal charges were brought against John Rapanos for the unpermitted filling of wetlands on the Salzburg site resulting from land-clearing activities. *Id.* at A2-A4. Upon conviction in 1995, Rapanos was fined $185,000 and sentenced to three years probation. *Id.* at A4. The conviction was upheld by the Sixth Circuit but this Court vacated the conviction and remanded the case in light of *SWANCC* in 2001. *Id.* On remand, the district court set aside the conviction ruling that, under *SWANCC*, the federal government lacked jurisdiction to

regulate wetlands that are not physically adjacent to navigable waters. *Id.* at A4-A5. *See also United States v. Rapanos*, 190 F. Supp. 2d 1011 (E.D. Mich. 2002). But, on appeal, the Sixth Circuit reversed the district court, finding *SWANCC* had little effect on CWA jurisdiction, and remanded the case for resentencing with mandatory jail time. *Id.* at A5. A subsequent petition for writ of certiorari by Rapanos was denied by this Court in 2004. *Id.* Simultaneous to the criminal case in 1994, this civil action was brought against the Rapanos for land-clearing activities on all three sites. *Id.*

The CWA prohibits discharges of "fill" material into "navigable waters" without a permit from the federal government. *See* 33 U.S.C. §§ 1311(a) and 1344(a) (CWA § 301(a) and 404(a)). The Act defines "navigable waters" only as "waters of the United States." 33 U.S.C. § 1362(5-7). Although the CWA does not mention "wetlands" in any relevant provision, federal agencies have defined "waters of the United States" to include wetlands the "use, degradation or destruction of which could affect interstate or foreign commerce" or any wetland "adjacent" to a tributary of defined waters. 33 CFR § 328.3(a)(3), (7). In this case, the government and the courts have interpreted that definition to authorize federal regulation of any wetland with a "hydrological connection" to a navigable water. *See* App. A and B.

A. The District Court Decision

Between 1988 and 1997, the Rapanos hired contractors to prepare the Salzburg, Hines Road, and Pine River sites for development. *See* App. A2-A4. The government contends the site preparations resulted in the filling of jurisdictional wetlands with sand and other materials in violation of section 404(a) of the CWA. *See* App. B1. Therefore, the Environmental Protection Agency ordered the Rapanos to stop all land-clearing activities and to restore the sites to their original condition. *Id.*

at B30-36. When the Rapanos refused, based on their belief that the CWA did not apply to their land, the United States brought this suit. *Id.* at B2.

After a bench trial, the district court found the Rapanos had filled 54 acres of wetlands on the three sites. *See* App. A5. In reliance on the government's "Migratory Bird Rule," the district court rejected the Rapanos' defense that CWA jurisdiction does not extend to wetlands far removed from actual navigable waters. That rule was an administrative interpretation of "navigable waters" and authorized federal regulation of any water that could be used by migratory birds. *Id.* at A11. However, after this Court ruled the "Migratory Bird Rule" invalid in *SWANCC* because it exceeded statutory authority, the district court "amended its findings to remove all references to the 'Migratory Bird Rule' as a basis for federal jurisdiction." *Id.* at A6 n.2. Instead, the court held the wetlands on the Rapanos' property were "adjacent" to tributaries and, therefore, jurisdictional because they are "hydrologically connected" to navigable waters. *Id.* at A8.

But in the case of the Salzburg site, the nearest navigable water is more than 20 miles away. *See Rapanos*, 190 F. Supp. 2d at 1012. Any surface water connection is intermittent and connected to a navigable waterway only by means of a manmade ditch, a nonnavigable creek and a river that ultimately flows into the Saginaw Bay. *Id.* at 1014-15. Likewise, the wetlands on the Hines Road and Pine River sites are connected to navigable waters only through surface runoff that purportedly flows into nonnavigable tributaries to distant navigable waters. *See* App. B20, B26. Relying on *SWANCC*, the Rapanos appealed.

B. The Sixth Circuit Opinion

On appeal, the Rapanos argued this Court's decision in *SWANCC* did more than invalidate the "Migratory Bird Rule;"

it also prohibited federal regulation of wetlands that do not physically abut a traditional navigable, water. *See* App. A20-A21. In *SWANCC*, this Court explained its landmark decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), noting it held in that case "that the Corps had § 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway." *SWANCC*, 531 U.S. at 167. This Court explained further that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed [its] reading of the CWA in *Riverside Bayview Homes*." *Id.* This Court pointed out, however, that it had expressed no opinion in that case on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." *Id.* With the stage thus set, this Court proceeded to answer that question:

> In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But, we conclude that the text of the statute will not allow this.

Id. at 168.

Although the Sixth Circuit readily acknowledged the wetlands on the Rapanos' parcels are not physically adjacent to, or directly abut, an open body of navigable water, the court found this fact irrelevant to its jurisdictional determination:

> What is required for CWA jurisdiction over "adjacent waters," however, is a "significant nexus between the wetlands and 'navigable waters,' " . . . which can be satisfied by the presence of a hydrological connection.

App. A16.

According to the Sixth Circuit, this Court's decision in *Riverside Bayview* does not require physical adjacency between a wetland and a navigable water to establish CWA jurisdiction, whereas this Court's decision in *SWANCC* only invalidated the "Migratory Bird Rule" and did not further limit the scope of the CWA. *See* App. A14. Nevertheless, the court recognized that its broad reading of *Riverside Bayview* and narrow reading of *SWANCC*, which had also been adopted by the courts in other circuits, created a direct conflict with the Fifth Circuit's decision in *In re Needham*, 354 F.3d 340 (5th Cir. 2003). *Id.*

The primary difference the Sixth Circuit cited between its understanding of CWA jurisdiction and the Fifth Circuit concerned the "adjacency" requirement as determined by this Court in *SWANCC*:

> The Fifth Circuit requires that non-navigable water be "truly adjacent to navigable waters" in order to qualify for CWA jurisdiction. The majority of courts, including this one, however, construe *Riverside Bayview* and *SWANCC* to hold that, while a hydrological connection between the non-navigable and navigable waters is required, there is no "direct abutment" requirement.

App. A16.

The Sixth Circuit's crabbed reading of *SWANCC* did not stop there, however. The court also failed to follow this Court's lead in denying deference to the government's interpretation of the CWA under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* App. A17-A20. In *SWANCC*, as the Sixth Circuit noted, this Court refused to accord *Chevron* deference to the government's "Migratory Bird Rule," which authorized federal regulation of nonadjacent waters, because the regulation impinged on the state's "traditional and primary power over land and water use"

and, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* at A19 (citing *SWANCC*, 531 U.S. at 173-74).

But, without citing any evidence that Congress intended the CWA to cover nonabutting wetlands or that the regulation of such wetlands does not impinge on the State's traditional and primary power over land and water use, the Sixth Circuit determined *Chevron* deference was appropriate in this case because this Court applied such deference in *Riverside Bayview*. *Id.* at A19-A20. Although *Riverside Bayview* involved wetlands that actually abutted a navigable waterway, and this case does not, the Sixth Circuit held the government's interpretation of "waters of the United States" was reasonable under *Chevron*. *Id.* at A20.

REASONS FOR GRANTING THE WRIT

I

THERE IS A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER FEDERAL JURISDICTION UNDER SECTION 404 OF THE CLEAN WATER ACT EXTENDS TO INTRASTATE, NONNAVIGABLE WETLANDS THAT DO NOT ABUT A TRADITIONAL NAVIGABLE WATER

With obvious frustration, the Sixth Circuit remarked: "determining the precise boundary of which waters are covered by the CWA has been difficult" for the courts. App. A7. So difficult in fact, that the court felt compelled to mention the difficulty again and again. *See* App. A8 ("Determining which

wetlands are considered 'adjacent to' traditional navigable waters or their tributaries has proved to be a complication in defining CWA jurisdiction."). *Id.* ("Determining how much of a connection is necessary has proven difficult."). The court lays blame for this difficulty squarely on this Court's decisions in *Riverside Bayview* and *SWANCC*. "Unfortunately, the two leading Supreme Court cases on the reach of the CWA have done little to clear the muddied waters of CWA jurisdiction." *Id.*

The Court of Appeals appears to be calling for further clarification, but its decision in this case has muddied the waters even further while expressly acknowledging a conflict between the Sixth Circuit (and other Courts of Appeals) and the Fifth Circuit. As if to punctuate the need for this Court's resolution, the Sixth Circuit takes pains to lay out the exact nature of this conflict.

The definitive statement of the Fifth Circuit's interpretation of CWA jurisdiction, cited by the Sixth Circuit, is found in *Needham*. But to put that case in context, a look at *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), is instructive. In *Rice*, an action was brought against Harken Exploration Company under the Oil Pollution Act (OPA) for oil spills on Rice's property in Hutchinson County, Texas. Among other things, the OPA imposes strict liability on parties responsible for discharging oil into "navigable waters," defined as "waters of the United States." *Id.* at 266-67. The scope of the OPA was an issue of first impression for the Fifth Circuit and required the court to define "navigable waters." *Id.* at 267.

Because only a few cases had construed the OPA, the court turned to the cases interpreting the term "navigable waters" under the CWA. The Fifth Circuit determined that the legislative history and the use of identical definitions of

"navigable waters" in the OPA and CWA suggested Congress intended the term to "have the same meaning" in both Acts. *Id.*

The Fifth Circuit began its analysis with *Riverside Bayview* noting this Court appeared to adopt an expansive reading of "navigable waters" which the Fifth Circuit had previously followed. *Id.* at 268. But the court concluded its analysis with *SWANCC,* stating this Court had more recently "limited the scope of the CWA." *Id.*

The Fifth Circuit observed that in *SWANCC*, this Court had "distinguished *Riverside Bayview Homes* on the ground that in that case the wetlands in question were adjacent to a body of open water that was actually navigable" and that the term "navigable waters" had to have some effect. *Id.* Based on its reading of *SWANCC*, therefore, the Fifth Circuit declined to characterize a small seasonal creek as "waters of the United States" subject to federal regulation under either the OPA or CWA, even though the creek flowed intermittently into the Canadian River, a "navigable water." "Instead," the court held, "a body of water is protected under the Act only if it is actually navigable or is adjacent to an open body of navigable water." *Id.* at 270.

More recently, the Fifth Circuit affirmed its holding in *Rice* and expressly rejected the interpretation of CWA jurisdiction which the Sixth Circuit applied in this case. In *Needham*, the Fifth Circuit was again required to determine the scope of "navigable waters" under the OPA and, as in *Rice*, the Fifth Circuit relied on *SWANCC* for this determination. *See In re Needham*, 354 F.3d at 344-47.

In *Needham*, as in this case, the government argued the definition of navigable waters "covers all waters, excluding groundwater, that have any hydrological connection with 'navigable water.'" *Id.* at 345. The Fifth Circuit acknowledged some support for this view noting at least two appellate courts

had agreed with the government's interpretation: *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003) ("asserting authority, under the CWA, over wetlands that are 'adjacent to, and drain into, a roadside ditch whose waters eventually flow into the navigable Wicomico River and Chesapeake Bay' "), and the Sixth Circuit in the Rapanos criminal case ("asserting authority, under the CWA, over wetlands that flow into a man-made drain, which in turn flows into a creek, which in turn flows into a navigable river."). *In re Needham*, 354 F.3d at 345.

But the Fifth Circuit expressly rejected this interpretation, stating unequivocally that the government's definition of navigable waters "is unsustainable" under *SWANCC*. *Id.* So as not to be misunderstood, the court stated further that the CWA and OPA are not so broad as to permit federal regulation of "tributaries" that are neither navigable in fact nor adjacent to such waters. *Id.* The court thus held:

> Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water."

In Re Needham at 345-46 (citing *Rice*, 250 F.3d at 269).

This conclusion puts the Fifth Circuit in direct conflict with other circuits that have addressed CWA jurisdiction. As the Sixth Circuit observed, the *Needham* court disagreed with decisions from the Fourth, Sixth, Seventh, and Ninth Circuits that, under *SWANCC*, "water exhibiting a hydrological connection with 'navigable water' should be considered part of the 'waters of the United States.'" *See* App. A at A14. Instead, the Sixth Circuit stated, the *Needham* court found that the

"water must be 'truly adjacent to navigable waters,'" thus supporting the Rapanos' abutment argument. *Id.*

As noted by the Sixth Circuit, this disagreement runs to the following noteworthy cases: *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003) (finding that *SWANCC* merely invalidated the "Migratory Bird Rule"); *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407, 415 (4th Cir. 2003) (noting that *SWANCC* reaffirmed a broad reading of CWA jurisdiction); *United States v. Deaton*, 332 F.3d 698 at 703 (holding that *SWANCC* did not disavow any Corps interpretations of the CWA, except the "Migratory Bird Rule"); *United States v. Rueth Development Company*, 335 F.3d 598, 604 (7th Cir. 2003), *cert denied*, (finding *SWANCC* did not significantly limit the government's wetland jurisdiction); *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 533-34 (9th Cir. 2001) (expressing the view that *SWANCC* did not change the conclusion that waters flowing into navigable waters are jurisdictional). *See* App. at A14-A15.

This conflict among the circuits is real and substantial and involves an important question of law. To resolve this conflict, therefore, this Court should grant the petition.

II

THE EXTENSION OF CLEAN WATER ACT JURISDICTION TO EVERY INTRASTATE WETLAND WITH ANY SORT OF HYDROLOGICAL CONNECTION TO NAVIGABLE WATERS, NO MATTER HOW TENUOUS OR REMOTE THE CONNECTION, EXCEEDS CONGRESS' CONSTITUTIONAL POWER TO REGULATE COMMERCE AMONG THE STATES

In *SWANCC*, this Court held the word "navigable" constrains the jurisdictional reach of the Clean Water Act. Otherwise, "the use of the word navigable in the statute . . . does not have any independent significance." *SWANCC*, 531 U.S. at 172. Accordingly, this Court found: "the term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.*

Besides the Act's express language, this Court gave another reason for limiting section 404(a) to Congress' traditional power over navigable waters. This Court found the government's application of its CWA regulations to nonnavigable, isolated, intrastate waters was overly broad and a "far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends" and thus raises "significant constitutional questions." *Id.* at 173-74.

But federal regulation of the wetlands in this case raises the same "significant constitutional questions" and is, likewise, a "far cry" from the waters "to which the statute by its terms extends." According to the Sixth Circuit, nonnavigable,

intrastate wetlands are subject to federal jurisdiction if they are merely connected to navigable waters:

> What is required for CWA jurisdiction over "adjacent waters," however, is a "significant nexus between the wetlands and 'navigable waters,'" . . . *which can be satisfied by the presence of a hydrological connection.*

App. A16. (emphasis added).

Therefore, under this decision, CWA jurisdiction extends to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection. This is evidenced by the facts in this case. It is undisputed that the intrastate wetlands on the Rapanos' property are not navigable waters. Nor do they abut a navigable water. To the contrary, they have only an intermittent, indirect and remote surface runoff connection to the nearest navigable waters, which in the case of the Salzburg site is 20 miles away.

In *SWANCC*, the government argued, much as it has in this case, that the CWA reaches "nonnavigable, isolated, intrastate" waters. *SWANCC*, 531 U.S. at 172. However, this Court determined the government's broad interpretation of the statute invoked "the outer limits of Congress' power" and could not be sustained. *Id.*

> Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

Id. at 173 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988)).

The constitutional problem was the government's claim that it could regulate any waters that could be used by migratory birds under "Congress' power to regulate intrastate activities that 'substantially affect' interstate commerce." *SWANCC*, 531 U.S. at 173. This Court was clearly skeptical of that argument and, to underscore the point, cited its Commerce Clause decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), stating: "Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." *SWANCC*, 531 U.S. at 173.

Evidently, because the regulation of nonnavigable, isolated, intrastate waters implied unlimited Commerce Clause authority in the federal government, this Court was unwilling to read such authority into the CWA. But the government's assertion of authority over any wetland with a hydrological connection to a navigable water in this case implies essentially the same limitless commerce power as the "Migratory Bird Rule" and is likewise invalid.

In *Lopez*, as subsequently affirmed in *Morrison*, this Court set forth a simple standard for analyzing Commerce Clause enactments that are based on the regulation of activities that substantially affect interstate commerce, like the CWA. These cases show the government has exceeded its authority in this case.

A. Under *Lopez* and *Morrison*, Intrastate Activity May Be Regulated for Its Substantial Effects on Interstate Commerce Only if the Regulated Activity Is Economic in Nature

The Gun-Free School Zones Act of 1990 made it a federal offense "for any individual knowingly to possess a firearm . . . at a place that the individual knows, or has reasonable cause to

believe, is a school zone." 18 U.S.C. § 922(q)(2)(A). Lopez, a 12th-grade student, was arrested and charged under this Act when he brought a concealed .38 caliber handgun and five bullets to school. *Lopez*, 514 U.S. at 551. However, Lopez challenged the Act as beyond the commerce power of Congress. *Id.* The Fifth Circuit agreed with Lopez and this Court affirmed. *Id.* at 552.

In *Lopez,* this Court declared the purpose of its inquiry was to determine if Congress intended to regulate commerce, and then to ascertain "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Id.* at 557.

First, this Court turned to the statute itself and found section 922(q), by its own terms, had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561. This obvious conclusion was compelled by the express language of the Act which made the mere possession of a firearm in a school zone a crime. It followed, therefore, that the regulated act, the possession of a gun, was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez* at 561. In fact, this Court observed, the Act was a criminal statute that did not involve a commercial or economic regulatory scheme at all. *Id.* Accordingly, section 922(q) could not be sustained under this Court's cases that allowed congressional regulation of activities "that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* Interestingly, this Court came to this conclusion even though the prohibited activity, possession of a gun, involved a commercial item.

Second, this Court sought to determine whether section 922(q) contained a "jurisdictional element" that would ensure on a case-by-case basis that the possession of a firearm substantially affects interstate commerce. *Id.* at 562. For that determination, this Court turned again to the language of the Act and found it did not provide an express requirement that would "limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.*

Third, because no substantial effect was "visible to the naked eye," in the text of the Act itself, this Court also looked to the legislative history to locate any express congressional findings that demonstrated Congress' belief that the possession of a gun in a school zone substantially affected interstate commerce. *Id.* at 562-63. But this Court found none.

Nevertheless, the government argued that Congress could rationally have concluded that section 922(q) did substantially affect interstate commerce because possession of a gun in a school zone may result in violent crime and violent crime interferes with the national economy in two respects: (1) violent crime increases the cost of insurance throughout the nation, and (2) violent crime deters people from traveling to unsafe areas. *Id.* at 563-64. The government also argued that guns in school undermine the learning environment, producing less productive citizens, which hurts the national economy. *Id.* at 564. To underscore the inherent limitations on the commerce power, this Court also addressed the implications of those arguments.

The government acknowledged under its "costs of crime" argument, that Congress could regulate any activity that might lead to violent crime no matter how remote the connection to interstate commerce. *Id.* Likewise, this Court found that under the government's "national productivity" argument, Congress

could regulate anything related to individual economic productivity. *Id.* If these arguments were accepted, this Court concluded, it would be "hard pressed" to find any individual activity that Congress could not regulate under the commerce power. *Id.* "Depending on the level of generality," this Court observed, "any activity can be looked upon as commercial." *Id.* at 565.

This was the fallacy in the government's arguments; they provided no logical stopping point to congressional authority and converted the commerce power into a general police power like that enjoyed by the states. *Id.* at 567. Although some of this Court's earlier cases leaned in that direction and suggested a possible expansion of the commerce power, this Court set aside section 922(q) as an invalid Commerce Clause enactment and declined in *Lopez* to go any further. *Id.* "To do so," this Court stated, "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated . . . and that there never will be a distinction between what is truly national and what is truly local." *Id.* at 567-68.

As if to demonstrate that *Lopez* was no anomaly, this Court affirmed that opinion five years later in *Morrison.* In *Morrison*, Christy Brzonkala brought an action against two university students for rape under section 13981 of the Violence Against Women Act of 1994. That Act provided a federal civil remedy for victims of gender-motivated violence and stated that "persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). The Act defined gender-motivated crime as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1). The district court dismissed the suit because it determined that section 13981 was

an invalid Commerce Clause enactment. The Fourth Circuit, sitting en banc, and this Court both affirmed.

Relying on *Lopez*, this Court first determined, as it must, that the statute, by its terms, had nothing to do with commerce: "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613. As a result, this Court held gender-motivated crimes are not the type of activity that, through repetition elsewhere, would substantially affect interstate commerce. *Id.* at 610-11.

This determination was critical to the outcome of the case. As this Court observed, the noneconomic, criminal nature of the prohibited activity in *Lopez* was central to its decision in that case. *Id.* at 610. But this Court did not stop there. To further illustrate the importance of this factor, this Court stated, as a matter of historical fact, that it had upheld federal regulation of intrastate activity based on its "substantial effects" on interstate commerce *only* when the regulated activity was economic in nature. *Id.* at 611, 613.

Next, this Court determined the Violence Against Women Act did not contain an express "jurisdictional element" establishing that Congress was attempting to regulate interstate commerce. *Id.* at 613. Rather than limit its reach to a discrete set of gender-motivated violent crimes that had an explicit connection with or effect on interstate commerce, this Court found section 13981 was drawn too broadly and included purely intrastate violent crime. *Id.* This Court concluded, therefore, that the language of the Act did not support the conclusion that section13981 was adequately tied to interstate commerce. *Id.*

Unlike the situation in *Lopez*, however, this Court did find that the Violence Against Women Act was supported by congressional findings that gender-motivated violence affects interstate commerce. *Id.* at 614. Among others, those effects included deterring victims from traveling interstate or engaging

in interstate business. *Id.* at 615. Diminishing national productivity, increased medical costs, and a decrease in the supply and demand of interstate goods were also cited. *Id.* But this Court did not believe these findings were sufficient to uphold the Act under the Commerce Clause: "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* at 614. That determination, this Court stated, is for the courts to decide. *Id.*

Because Congress followed the but-for causal chain from the original violent act to every remote effect upon interstate commerce, this Court decided that Congress' findings were faulty and relied on a "method of reasoning" that obliterates the distinction between what is national and what is local and which this Court had already rejected in *Lopez*. *Id.* at 615. This Court was simply unwilling to allow Congress to regulate noneconomic activity, such as gender-motivated acts of violence, based only on that activity's attenuated effects on interstate commerce. *Id.* at 617. Therefore, this Court held that Congress did not have authority under the Commerce Clause to enact section 13981 of the Violence Against Women Act. *Id.* at 619.

B. The Extension of CWA Jurisdiction over Any Water with a Hydrological Connection to a Navigable Water Fails the *Lopez* Standard for "Substantial Effects"

Both *Lopez* and *Morrison* strongly affirmed that federal power under the Commerce Clause is limited in order to prevent the federal government from becoming a government of general powers, like the states. *Lopez*, 514 U.S. at 559-68; *Morrison*, 529 U.S. at 617-19. These cases recognized that the Constitution prohibits the federal government from regulating noneconomic intrastate activities like the filling of remote,

nonnavigable, intrastate wetlands in this case, that have only an attenuated connection to interstate commerce and obliterate the "distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68. A faithful application of the *Lopez* standard to the facts in this case demonstrates that the regulation of the Rapanos' land-clearing activities exceeds the commerce power and is invalid.

As expressed by this Court, four factors contributed to its decision in *Lopez*. The first factor was that the statute, by its terms, had nothing to do with commerce or an economic enterprise; that is, the Act did not purport to regulate an economic activity. *See Morrison*, 529 U.S. at 610. The second factor was that the Act contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 611-12. This factor was important to establish that the Act was in "pursuance of Congress' regulation of interstate commerce." *Id.* The third factor was that neither the statute "nor its legislative history contain[ed] express congressional findings regarding the effects upon interstate commerce" of the regulated activity. *Id.* at 612. And, the fourth factor was that the connection between the regulated activity and a substantial effect on interstate commerce was attenuated. *Id.*

The first factor is the most telling and focuses on the express language of the Act. As this Court observed in *Lopez*, "§ 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 516. As interpreted by the government and the court below, the CWA fares no better.

The CWA provides that "the discharge of any pollutant by any person shall be unlawful," unless approved by the federal

government. 33 U.S.C. § 1311(a) (CWA § 301(a)). The Act provides further that: "The Secretary may issue permits . . . for the discharge of dredged or fill materials into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) (CWA § 404(a)). The term "navigable waters" is defined simply as "waters of the United States." 33 U.S.C. § 1362(7) (CWA § 502(7)). It was under these statutory provisions that the Rapanos were cited for filling wetlands without a permit.

Like the statutes in *Lopez* and *Morrison*, the CWA prohibition on the discharge of fill material into navigable waters by any person, does not, by its terms, have anything to do with commerce or an economic activity or enterprise however broadly those terms are defined. The prohibition applies to all discharges, whatever the source. Whether the discharge is caused by a child playing with a pail of sand or by the operation of a backhoe, it is the same. The text of the Act gives no indication that Congress intended to regulate commerce by prohibiting discharges to remote wetlands. Under *Lopez* and *Morrison*, this alone is sufficient to invalidate federal regulation of the wetlands in this case: "[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613.

Only one exception applies. If the Act does not, by its terms, purport to regulate economic activity, then the provision may be upheld as a proper Commerce Clause enactment if the provision contains an express "jurisdictional element which would ensure, through case-by-case inquiry that the [regulated activity] affects interstate commerce." *Lopez*, 514 U.S. at 561. This is the second *Lopez* factor. But in this case, the statutory definition of "navigable waters" as "waters of the United States," does not contain any reference to interstate commerce. There is no jurisdictional statement. Moreover, the Sixth Circuit held in this case it is enough if the regulated wetlands

have a mere hydrological connection with a navigable water. Therefore, the statutory definition of "navigable waters" in this case suffers from the same problem as the provisions challenged in *Lopez* and *Morrison*; it is too broad and sweeps in waters that have no actual effect on interstate commerce. *See Morrison*, 529 U.S. at 613.

The third *Lopez* factor involves a consideration of the legislative history to determine if Congress was pursuing its power to regulate interstate commerce and to allow the court to consider the legislative judgment that the regulated activity substantially affects interstate commerce. *See Morrison*, 529 U.S. at 612. In *SWANCC*, the government argued the legislative history of the CWA supported its view that Congress intended to exercise its commerce power to its full extent. But, this Court disagreed, noting the legislative history does not indicate that Congress intended to exercise any Commerce Clause authority over remote wetlands:

> Respondents refer us to portions of the legislative history that they believe indicate Congress' intent to expand the definition of "navigable waters." Although the Conference Report includes the statement that the conferees "intend that the term 'navigable waters' be given the broadest possible constitutional interpretation," S. Conf. Rep. No. 92-1236, p. 144 (1972), U.S. Code Cong. & Admin. News 1972 pp. 3668, 3822, neither this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation. Indeed, respondents admit that the legislative history is somewhat ambiguous.

SWANCC, 531 U.S. at 168 n.3.

As in *Lopez*, neither the statute nor the legislative history contains "express congressional findings regarding the effects upon interstate commerce" of the filling of remote, intrastate wetlands. *See Morrison*, 529 U.S. 612.

The fourth and final *Lopez* factor involves a determination as to whether the regulated activity is so removed from any substantial impact on interstate commerce that to allow such regulation would obliterate the distinction between what is national and what is local. *Id.* at 615. This determination appears to be foregone when the court finds the other three factors do not support the enactment, as here.

In this case, neither the statutory definition of "navigable waters" nor the prohibition on discharges to "navigable waters" without a permit has, by its terms, anything to do with economic activity and there is no express jurisdictional element to limit the Act to a "discrete set of [discharges] that additionally have an explicit connection with or effect on interstate commerce" as the *Lopez* standard requires. *Lopez*, 514 U.S. at 562. There are also no express findings in the legislative history to support the regulation of remote, intrastate wetlands as a regulation of commerce. These factors suggest the connection to interstate commerce is attenuated and that no "rational basis existed for concluding that [the] regulated activity sufficiently affected interstate commerce." *Id.* at 557. Moreover, it is axiomatic that to allow federal regulation of any water that has a mere hydrological connection to a navigable water would "completely obliterate the Constitution's distinction between national and local authority." *Morrison*, 529 U.S. at 615. So long as a federal permit is required to fill such waters, the federal government has a virtual veto power over local land and water use. If the federal government can regulate all waters hydrologically connected to a navigable water, no matter how tenuous or remote the connection, there

is virtually nothing the government could not regulate under the commerce power.

Under the *Lopez* standard, the regulation of the filling of remote, nonnavigable, intrastate wetlands utterly fails as a valid exercise of the Commerce Clause power. Therefore, the decision below should be overturned.

CONCLUSION

This case raises a question of immense federal importance—the scope of federal authority over "waters of the United States." The lower courts are starkly divided on that question. Whereas the Fourth, Sixth, Seventh, and Ninth Circuits have broadly interpreted the CWA to cover all waters with a hydrological connection to a navigable water, no matter how tenuous or remote the connection, the Fifth Circuit has expressly rejected that interpretation as "unsustainable" under this Court's precedents. This conflict alone warrants Supreme Court review. But there is more. The Sixth Circuit decision in this case not only authorizes federal regulation of wetlands in excess of statutory authority but beyond constitutional limits as well. Review by this Court is, therefore, necessary to a resolution of these issues.

For these reasons, this Court should grant the Rapanos' petition for writ of certiorari.

DATED: January, 2005.

Respectfully submitted,

M. REED HOPPER
Counsel of Record
ROBIN L. RIVETT
GREGORY T. BRODERICK
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioners

Appendix A1

No. 03-1489

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES of America,	)	Argued June 9, 2004
	)	Decided and Filed
Plaintiff-Appellee,	)	July 26, 2004
	)	
v.	)	Rehearing En Banc
	)	Denied Nov. 2, 2004
John A. RAPANOS; Judith A.	)	
Nelkie Rapanos; Prodo, Inc.;	)	
Rolling Meadows Hunt Club;	)	
Pine River Bluff Estates, Inc.,	)	
	)	
Defendants-Appellants.	)	

OPINION

REEVES, District Judge.

Plaintiff-Appellee United States brought suit against the Defendants pursuant to the Federal Water Pollution Control Act Amendments of 1972, Pub.L. No. 92-500, 86 Stat. 817, as amended 33 U.S.C. § 1251 *et seq*., commonly known as the Clean Water Act ("CWA"). Defendants-Appellants John Rapanos, Judith Rapanos, Prodo, Inc., Rolling Meadows Hunt Club, and Pine River Bluff Estates, Inc. appeal the district court's entry of judgment in favor of the United States. Prodo, Inc., Rolling Meadows Hunt Club, and Pine River Bluff Estates, Inc. are wholly owned by John and Judith Rapanos. For the reasons discussed below, we AFFIRM the judgment of the district court.

BACKGROUND

The Rapanos, through their wholly-owned companies, owned various parcels of land in Bay, Midland, and Saginaw Counties in Michigan. These parcels are known as the Salzburg, Hines Road, Pine River, Freeland, Mapleton, and Jefferson Avenue sites. The Rapanos were charged with illegally discharging fill material into protected wetlands at these sites between 1988 and 1997. The United States alleges that the Rapanos attempted to fill these wetlands to make the land more conducive to development.

I. The Salzburg Site

Before filling wetlands subject to CWA jurisdiction, a landowner must first obtain a permit from the Army Corps of Engineers ("Corps"). 33 U.S.C. § 1344. In December 1988, John Rapanos asked the state to inspect the Salzburg site in hope of obtaining a permit to construct a shopping center at this location. The state informed him that the site was likely a regulated wetland and sent him an application for the necessary permits. A state representative toured the site in March 1989, noting that the site probably contained wetlands but could be developed if the necessary permits were issued. Mr. Rapanos hired a consultant, Dr. Goff, to prepare a report detailing the wetlands on the Salzburg site. Dr. Goff concluded that there were between 48 and 58 acres of wetlands on the site, presenting his findings in the form of a report and a map. Upset by the report, Mr. Rapanos ordered Dr. Goff to destroy both the report and map, as well as all references to Mr. Rapanos in Dr. Goff's files. However, Dr. Goff was unwilling to do so. Mr. Rapanos stated he would "destroy" Dr. Goff if he did not comply, claiming that he would do away with the report and bulldoze the site himself, regardless of Dr. Goff's findings.

In April 1989, workers began leveling the ground, filling in low spots, clearing brush, removing stumps, moving dirt, and dumping sand to cover most of the wetland vegetation. This activity caused Dr. Goff to note that the site now looked "like nothing more than a beach." In August 1989 the state attempted to inspect the Salzburg site, but was denied access. Three months later, authorities from the state returned, armed with a search warrant.

In 1991, a state representative returned to the Salzburg site, noting that the site had been "tiled" to drain subsurface water. When Mr. Rapanos refused to comply with an administrative compliance order issued by the Environmental Protection Agency ("EPA") (requiring him to immediately cease his filling of the Salzburg site), the EPA referred the matter to the Department of Justice.

II. The Hines Road Site

The Defendants undertook to expand drains, build roads, and fill the wetlands at the Hines Road site. However, in July 1992, the state issued a cease and desist letter to stop the ongoing activity. Mr. Rapanos did not reply to this letter. Thereafter, the state conducted an examination of the site pursuant to a search warrant in June 1994. In June 1997, the state returned to the site and noted that fill had been added to certain areas since the 1994 search. Accordingly, the EPA issued an administrative compliance order. The EPA alleges that Mr. Rapanos did not comply with this order.

III. The Pine River Site

Mr. Rapanos also hired contractors at the Pine River site to construct ditches, spread dirt and sand, construct roads, and clear vegetation. The state sent Mr. Rapanos a cease and desist order after an official observed that portions of the wetlands had

been filled. The EPA issued an administrative compliance order in September 1997 after Mr. Rapanos refused to comply with the cease and desist order. The EPA alleges that Mr. Rapanos also did not comply with the administrative order.

IV. The Criminal Proceedings

Criminal charges were brought simultaneously with the instant civil action. In July 1994, the district court declared a mistrial in Mr. Rapanos' criminal trial. The trial was moved to Flint, Michigan and, on March 7, 1995, the jury in the second trial returned a guilty verdict on two counts. *United States v. Rapanos*, 895 F. Supp. 165, 166 (E.D. Mich.1995). Following trial, the district court granted Rapanos' motion for a new trial, finding that the court had improperly allowed the United States to pursue a line of questioning that was prejudicial to the defendant. *Id.* at 169-70. This court, however, determined that the line of questioning was not improper and reversed the district court's grant of a new trial and remanded for sentencing. *United States v. Rapanos*, 115 F.3d 367, 374 (6th Cir. 1997). The district court sentenced Rapanos to three years probation and ordered him to pay a $185,000 fine. On appeal, this court affirmed the conviction but remanded for resentencing. *United States v. Rapanos*, 235 F.3d 256, 261 (6th Cir. 2000).

The Supreme Court granted Rapanos' request for a writ of certiorari, vacating and remanding this court's order in light of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed.2d 576 (2001) ("*SWANCC* "). *Rapanos v. United States*, 533 U.S. 913, 121 S. Ct. 2518, 150 L. Ed.2d 691 (2001). Following remand from the Supreme Court, this court remanded the case to the district court for further consideration. *United States v. Rapanos*, 16 Fed. Appx. 345 (6th Cir. 2001). On remand, the district court set aside the conviction, finding that the United States lacked jurisdiction in the wake of the

Supreme Court's ruling in *SWANCC*. *United States v. Rapanos*, 190 F. Supp.2d 1011 (E.D. Mich.2002). On appeal, this court reversed the order of the district court, reinstated the previous conviction and remanded to the district court for resentencing. *United States v. Rapanos*, 339 F.3d 447, 454 (6th Cir. 2003). A panel of this court determined that, despite the Supreme Court's decision in *SWANCC*, the United States retained jurisdiction over the wetlands at issue by virtue of the CWA.[1] Recently, the Supreme Court denied Rapanos' petition for a writ of certiorari. *Rapanos v. United States*, --- U.S. ----, 124 S. Ct. 1875, 158 L. Ed.2d 467 (2004).

V. The Civil Proceedings

The United States initiated this civil action in February 1994, confining its scope to the Salzburg site and naming only Mr. Rapanos as a defendant. In June 1996, the United States added Mrs. Rapanos to the complaint, as well as Prodo, Inc., a company owned by Mr. Rapanos. In February 1998, the United States amended its complaint to add allegations concerning the Hines Road and Pine River sites. Pine River Bluffs Estates was also added as a defendant.

Following a 13-day bench trial, the district court concluded that Rapanos had filled 22 of 28 acres of protected wetlands at the Salzburg site, 17 of 64 acres of protected wetlands at the Hines Road site, and 15 of 49 acres of protected wetlands at the Pine River site. The district court concluded that the government had established that 54 of the filled acres fit the

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[1] The land at issue in the criminal trial was the Salzburg site. The Salzburg site in the criminal trial is somewhat different than the Salzburg site involved in this proceeding.

three parameters for wetlands, i.e., vegetation, soils, and hydrology. In addition, the court found that the United States did not meet its burden regarding the existence of wetlands at the Freeland and Mapleton sites. The district court entered these findings and conclusions on March 22, 2000.[2]

STANDARD OF REVIEW

[1] Following a bench trial, this court reviews the district court's findings of fact for clear error and reviews its conclusions of law *de novo*. *Pledger v. United States*, 236 F.3d 315, 320 (6th Cir. 2000). Factual determinations of a trial court are not clearly erroneous unless we are "left with the definite and firm conviction that a mistake has been committed." *Id.* (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504, 84 L. Ed.2d 518 (1985)). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*, 470 U.S. at 573-74, 105 S. Ct. 1504.

DISCUSSION

On appeal, Rapanos argues that the district court erred when it (1) held that the disturbed wetlands were adjacent wetlands because they had a surface connection to waters of the United States; (2) failed to make subsidiary findings to support its conclusion that the Salzburg, Hines Road, and Pine River

[2] On January 10, 2003, after the Supreme Court overturned the "Migratory Bird Rule" as an excessive extension of jurisdiction under the CWA in SWANCC, the district court amended its findings to remove all references to the "Migratory Bird Rule" as a basis for federal jurisdiction.

sites had a hydrological connection to navigable waters; (3) allowed plaintiff's expert Dr. Willard to testify; (4) failed to consider Michigan's definition of "wetland"; (5) collaterally estopped Rapanos from denying liability at the Salzburg site; and (6) relied on Dr. Willard's testimony to determine the extent of unauthorized filling.

I. The CWA

In 1972, Congress reacted to the problem of water pollution by enacting the CWA. The CWA is viewed by some as the federal government's main weapon in its effort to protect wetlands. David Dornak, *A New Generation is Teeing Off: Is Tiger Woods Making Divots on Environmentally Sound Golf Courses*?, 23 Colum. J. Envtl. L. 299, 324 (1998). Section 404 of the CWA requires landowners to obtain permits from the Army Corps of Engineers ("Corps") before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123, 106 S. Ct. 455, 88 L. Ed.2d 419 (1985); *see also* 33 U.S.C. § 1344.

"Navigable waters" are defined as "waters of the United States, including territorial seas." 33 U.S.C. § 1362(7). The Supreme Court and this court have noted that "Congress chose to define waters covered by the Act broadly" in the CWA. *Riverside Bayview*, 474 U.S. at 133, 106 S. Ct. 455; *Rapanos*, 339 F.3d at 450-51. Determining the precise boundary of which waters are covered by the CWA has been difficult. It is well-settled that the CWA covers more than what has come to be known as "navigable in fact waters," i.e., waters that can be navigated in the traditional sense. *See id.* at 451. As the Supreme Court has noted, CWA jurisdiction extends beyond traditionally navigable waters because economic activities affecting interstate commerce are susceptible to "congressional regulation under the Commerce Clause irrespective of whether

navigation, or, indeed, water, is involved." *Kaiser Aetna v. United States*, 444 U.S. 164, 174, 100 S. Ct. 383, 62 L. Ed.2d 332 (1979).

The CWA's broad reach, extending beyond traditionally navigable waters, however, does not extend to all waters. The Code of Federal Regulations contains the Corps' interpretation of which waters are properly considered "waters of the United States." 33 C.F.R. § 328.3. In the present case, the district court relied on the Corps' exercise of jurisdiction over "wetlands adjacent to traditional navigable waters" as supporting CWA jurisdiction for the Defendants' lands. *Id.* at § 328.3(a)(7). It found that the wetlands were adjacent to tributaries of traditional navigable waters. The Corps asserts jurisdiction over such waters pursuant to the CWA. *Id.* at § § 328.3(a)(5), 328.3(a)(7).

Determining which wetlands are considered "adjacent to" traditional navigable waters or their tributaries has proved to be a complication in defining CWA jurisdiction. The Code of Federal Regulations states that "adjacent" means "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c).

In order to invoke federal jurisdiction the wetlands must bear some connection to navigable waters or interstate commerce. Determining how much of a connection is necessary has proven difficult. Unfortunately, the two leading Supreme Court cases on the reach of the CWA have done little to clear the muddied waters of CWA jurisdiction.

A. Riverside Bayview

Riverside Bayview Homes owned 80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan. It began filling part of the land with the intention of constructing a housing development on the site. The Corps determined that the land was an "adjacent wetland," thus falling under the ambit of the CWA. The district court determined that the land on the site below 575.5 feet above sea level was a wetland requiring the issuance of a permit before it could be filled. *Riverside Bayview*, 474 U.S. at 125, 106 S. Ct. 455. This court reversed the district court, concluding that adjacent wetlands only existed when the land was flooded by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation. *United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391 (6th Cir. 1984).

This court was largely motivated by Fifth Amendment takings concerns, concluding that the CWA must be read narrowly to avoid improper condemnation by the government. A unanimous Supreme Court, however, held that the Tucker Act, 28 U.S.C. § 1491, provides the owners of condemned land with the right of compensation and thus concluded that this court was not justified in reading the CWA's jurisdiction so narrowly. *Riverside Bayview*, 474 U.S. at 128, 106 S. Ct. 455. Having disposed of the Fifth Amendment issue, the Court concluded that "[t]he plain language of [33 C.F.R. § 323.2(c)] refutes the Court of Appeals' conclusion that inundation or 'frequent flooding' by the adjacent body of water is a *sine qua non* of a wetland under the regulation." *Id.* at 129, 106 S. Ct. 455.

Next, the Court addressed the issue of which waters could be considered "adjacent to navigable waters."

> In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.

Id. at 132, 106 S. Ct. 455.

The Court concluded that to protect against pollution "at its source, Congress sought to define coverage of the CWA broadly. *Id.* at 133, 106 S. Ct. 455. It noted that even wetlands that are not connected to adjacent bodies of water and are not regularly inundated by flooding may still have a connection to navigable waters because such water can drain into navigable waters. *Id.* at 134, 106 S.Ct. 455. These adjacent bodies of water can bring pollution to the navigable waters, resulting in possibly disastrous effects on the habitat and food chain for the native aquatic species. *See id.* at 134-35, 106 S. Ct. 455. Thus, the Court wrote that

> the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water . . . . [W]e cannot say that the Corps' judgment on these

> matters is unreasonable, and we therefore conclude that a definition of "waters of the United States" encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the [CWA].

Id. at 135, 106 S. Ct. 455.

B. *SWANCC*

After upholding a broad view of the CWA's jurisdictional reach in *Riverside Bayview*, a divided Supreme Court invalidated one of the Corps' jurisdictional regulations in *SWANCC*. The regulation at issue, known as "the Migratory Bird Rule," extended the definition of "waters of the United States" to include isolated waters that were used as habitat by migratory birds or endangered species. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986) (previously codified at 33 C.F.R. § 328.3). The disputed land was a 533 acre parcel straddling the Cook and Kane County lines in northern Illinois. The land was owned by the Solid Waste Agency of Northern Cook County, a consortium of 23 Chicago cities that sought to develop a garbage disposal site. *SWANCC*, 531 U.S. at 162-63, 121 S. Ct. 675. The Corps initially determined that it had no jurisdiction over the land because it did not contain any wetlands and did not support "vegetation typically adapted for life in saturated soil conditions." *Id.* at 164, 121 S. Ct. 675 (citing 33 C.F.R. § 328.3(b)). However, after learning that several migratory birds were observed at the site, the Corps asserted jurisdiction under the Migratory Bird Rule. *Id.*

The Seventh Circuit concluded that the federal government had the authority to use the Migratory Bird Rule, relying on the cumulative impact doctrine to conclude that, in toto, the impact on migratory birds from disturbing wholly intrastate,

non-navigable waters had a substantial impact on interstate commerce. *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 191 F.3d 845, 850 (7th Cir. 1999). A majority of the Supreme Court disagreed, however, holding that the Migratory Bird Rule was not supported by Congress' intent in passing the CWA and thus concluding that it was unnecessary to determine whether the Migratory Bird Rule fell within the broadest reach of Congress' commerce powers. *SWANCC*, 531 U.S. at 167, 121 S. Ct. 675.

In doing so, the Court first reaffirmed the holding in Riverside Bayview, pointing out that in Riverside Bayview

> we noted that the term "navigable" is of "limited import" and that Congress evidenced its intent to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term. But our holding was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters. We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands inseparably bound up with the "waters" of the United States.
>
> It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*. Indeed, we did not express any opinion on the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to open bodies of water. In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open

> water. But we conclude that the test of the statute will not allow this.

SWANCC, 531 U.S. at 167-68, 121 S. Ct. 675 (citations omitted) (emphasis in original).

The Court also refused to extend Chevron deference to the Corps' interpretation of its authority under the CWA. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.2d 694 (1984). It reasoned that such deference was inappropriate where the Corps was infringing upon a power usually reserved to the states, i.e., the authority to regulate land and water use. *SWANCC*, 531 U.S. at 172-74, 121 S. Ct. 675. Therefore, the Court concluded that Congress had not envisioned extending CWA jurisdiction to isolated, intrastate, non-navigable "ponds" simply by virtue of the fact that they were occasionally the home for migratory birds, despite the Corps' contrary interpretation of its authority. *Id.* at 171-72, 121 S. Ct. 675.

C. *Putting Riverside Bayview and SWANCC in Context*

The Court in *SWANCC* noted that even reading the CWA through a restrictive lens demonstrates that Congress "wanted to include all waters adjacent to 'navigable waters,' such as nonnavigable tributaries and streams" in its definition of "waters of the United States." *SWANCC*, 531 U.S. at 171, 121 S. Ct. 675. Lower courts have disagreed over the extent to which *SWANCC* limited *Riverside Bayview*'s holding. *SWANCC* only specifically addressed the Migratory Bird Rule, and in fact specifically held that it was not overruling any aspect of Riverside Bayview, yet its language has been seen by some as justification for a wide-ranging reduction of the CWA's jurisdiction. A minority of courts have done so, reading *SWANCC* broadly to limit the CWA to navigable waters and non-navigable waters that directly abut navigable waters.

In re Needham, 354 F.3d 340, 345-46 (5th Cir. 2003); *FD & P Enterprises, Inc. v. U.S. Army Corps of Engineers*, 239 F. Supp.2d 509, 516 (D.N.J.2003). Conversely, the majority of courts have interpreted *SWANCC* narrowly to hold that while the CWA does not reach isolated waters having no connection with navigable waters, it does reach inland waters that share a hydrological connection with navigable waters. *Rapanos*, 339 F.3d at 453; *Treacy v. Newdunn Assoc., LLP*, 344 F.3d 407, 415 (4th Cir. 2003); *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003), *cert. denied*, --- U.S. ----, 124 S. Ct. 1874, 158 L. Ed.2d 466 (2004); *United States v. Rueth Dev. Co.*, 335 F.3d 598, 604 (7th Cir. 2003), *cert. denied*, --- U.S. ----, 124 S. Ct. 835, 157 L. Ed.2d 699 (2003); *Headwaters v. Talent Irrigation District*, 243 F.3d 526, 533-34 (9th Cir. 2001); *Carabell v. United States Army Corps of Engineers*, 257 F. Supp.2d 917, 930 (E.D. Mich.2003); *United States v. Interstate Gen. Co.*, 152 F. Supp.2d 843, 847 (D. Md.2001).

The Fifth Circuit has adopted the more expansive reading of *SWANCC* and thus the more limited interpretation of the CWA's jurisdiction. *Needham*, 354 F.3d at 345-46. The Needham court disagreed that water exhibiting a hydrological connection with "navigable water" should be considered part of the "waters of the United States," instead finding that the water must be "truly adjacent to navigable waters," or at least have a "significant measure of proximity" to navigable waters. *Id.* at 345, 347, n. 12. In reaching this conclusion, the Fifth Circuit relied heavily on *SWANCC*, disagreeing with holdings from the Fourth, Seventh, and Ninth Circuits, as well as this court, that have adopted a limited interpretation of *SWANCC*. *Rapanos*, 339 F.3d at 453 (finding that the *SWANCC* court merely invalidated the Migratory Bird Rule and did not deal with the Corps' "adjacent waters" jurisdiction); *Treacy*, 344 F.3d at 415 (noting that *SWANCC* reaffirmed the holding in *Riverside Bayview* and did not abridge the Corps' authority over "adjacent waters"); *Deaton*, 332 F.3d at 702 (holding that *SWANCC* did

not disavow any of the Corps' interpretations of the CWA, save for the Migratory Bird Rule); *Rueth Dev. Co.*, 335 F.3d at 604 ("it is clear that *SWANCC* did not affect the law regarding the government's alternative asserted basis for jurisdiction adjacency under [the "adjacent water" rule]. The Corps' adjacency jurisdiction is well-established; it was upheld by the Supreme Court in [*Riverside Bayview*], and was reaffirmed in *SWANCC*"); *Headwaters*, 243 F.3d at 533-34 (holding that SWANCC did not impact its conclusion that waters flowing into navigable waters are within the CWA's jurisdiction); *Carabell*, 257 F. Supp.2d at 930 (concluding that *SWANCC*'s holding was narrow and did not require a body of water to directly abut navigable water in order to fall under the jurisdiction of the CWA); *Interstate Gen. Co.*, 152 F. Supp.2d at 847 ("[b]ecause the Supreme Court only reviewed 33 CFR § 328.3(a)(3), it would be improper for this Court to extend the *SWANCC* Court's ruling any further than they clearly intended"); *but see FD & P Enterprises*, 239 F. Supp.2d at 516 ("it is the view of this court that the 'hydrological connection' test is no longer the valid mode of analysis").

In Rapanos' criminal trial, a panel of this court adopted the limited reading of *SWANCC* criticized in *Needham*. Adopting the Fourth Circuit's reasoning in *Deaton*, this court held that

> because we find the Fourth Circuit's reasoning persuasive, we disagree with the broad interpretation of [*SWANCC*] taken by the district court in this case and, instead, agree with *Deaton*. Although the [*SWANCC*] opinion limits the application of the Clean Water Act, the Court did not go as far as Rapanos argues, restricting the Act's coverage to only wetlands directly abutting navigable water. Instead, the [*SWANCC*] Court, in a narrow holding, invalidated the Migratory Bird Rule as exceeding the authority granted to the [Corps] by the [CWA],

> because it found "nothing approaching a clear statement from Congress that it intended [the CWA] to reach an abandoned sand and gravel pit."

Rapanos, 339 F.3d at 453 (citations omitted).

> This court further adopted the holding in *Deaton*, that "adjacent waterways" include any branch of a tributary system that eventually flows into a navigable body of water. *Rapanos*, 339 F.3d at 452-53. This court concluded that the wetlands were adjacent because "[a]ny contamination of the Rapanos wetlands could affect the Drain, which, in turn could affect navigable-in-fact waters." *Id.*

Thus, the primary difference between the conclusion reached by the Fifth Circuit and that reached by the Fourth, Sixth, Seventh, and Ninth Circuits, concerns the "adjacency" requirement. The Fifth Circuit requires that the non-navigable water be "truly adjacent to navigable waters" in order to qualify for CWA jurisdiction. The majority of courts, including this one, however, construe *Riverside Bayview* and *SWANCC* to hold that, while a hydrological connection between the non-navigable and navigable waters is required, there is no "direct abutment" requirement.

[2] What is required for CWA jurisdiction over "adjacent waters," however, is a "significant nexus between the wetlands and 'navigable waters,'" *SWANCC*, 531 U.S. at 167, 121 S. Ct. 675, which can be satisfied by the presence of a hydrological connection. *Rapanos*, 339 F.3d at 453; *see also Deaton*, 332 F.3d at 711-12 (CWA jurisdiction extends to those waters adjacent to any branch of a tributary system that eventually flows into a navigable water, because these waters effect the water quality of navigable waters and thus there is a "substantial nexus" between the tributaries and the navigable

waters); *Headwaters*, 243 F.3d at 533 ("Because the canals receive water from natural streams and lakes, and divert water to streams and creeks, they are connected as tributaries to other 'waters of the United States'"). Waters sharing a hydrological connection are interconnected, sharing a symbiotic relationship. As Congress acknowledged when passing the CWA, "[w]ater moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source." *Rapanos*, 339 F.3d at 451 (citing S. Rep. No. 92-414, at 77 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3742).

Unlike the absence of Congressional support for the Migratory Bird Rule discussed in SWANCC, Congress clearly envisioned that CWA jurisdiction would extend to bodies of water exhibiting a hydrological connection to traditional navigable waters. As this court previously recognized

> [i]n *Riverside Bayview* the Supreme Court concluded that the Corps regulation extending jurisdiction to adjacent wetlands was a reasonable interpretation in part because of what [*SWANCC*] described as "the significant nexus between the wetlands and 'navigable waters.'" There is also a nexus between a navigable waterway and its nonnavigable tributaries . . . . This nexus, in light of the "breadth of congressional concern for protection of water quality and aquatic ecosystems," is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted. The regulation, as the Corps reads it, reflects a reasonable interpretation of the Clean Water Act.

Rapanos, 339 F.3d at 452 (quoting *Deaton*, 332 F.3d at 712).

D. *Chevron Deference*

[3] The doctrine of "administrative deference," also known as "*Chevron* deference," provides an alternative ground for affirming the Corps' authority over waters adjacent to tributaries of navigable waters. When Congress delegates authority to enforce a statute to a governmental agency, while leaving some ambiguity in how the agency is to enforce the statute, courts should assume that Congress impliedly delegated the authority to interpret the ambiguity to the agency charged with administering the statute. *Chevron*, 467 U.S. at 843-45, 104 S. Ct. 2778. The agency is thus in the position to "fill the gaps" left by Congress. Unless the agency's interpretation of the statute is "arbitrary, unreasonable, or manifestly contrary to the statute," the agency interpretation should be applied. *Id.* at 843-44, 104 S. Ct. 2778.

In *Chevron*, a unanimous Supreme Court pointed out that deferring to agency interpretations, rather than requiring judicial interpretation, served the interests of democracy, noting that

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the

> agency charged with the administration of the statute in light of everyday realities.
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: Our Constitution vests such responsibilities in the political branches.

Id. at 865-66, 104 S. Ct. 2778 (citation omitted).

> Before according deference to agency interpretations, a federal court "need not find that [the agency's interpretation] is the only permissible construction . . . but only that [its] understanding of this . . . statute is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency.]" *Chem. Mfrs. Ass'n v. Natural Resources Defense Council*, 470 U.S. 116, 125, 105 S. Ct. 1102, 84 L. Ed.2d 90 (1985) (citation omitted). In *SWANCC* the Supreme Court refused to accord *Chevron* deference to the Corps' Migratory Bird Rule. Noting that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress," the Court concluded that the Migratory Bird Rule infringed on the state's "traditional and primary power over land and water

use," and thus was not entitled to *Chevron* deference. *Id.* at 173-74, 121 S. Ct. 675 (citation omitted). In *Riverside Bayview*, however, the Supreme Court accorded *Chevron* deference to the Corps' conclusion that "waters of the United States" included wetlands adjacent to navigable waters. 474 U.S. at 134-35, 106 S. Ct. 455. As the *SWANCC* Court recognized, deference was appropriate in *Riverside Bayview* given the significant nexus between the adjacent waters and navigable waters that was not present in the "nonnavigable, isolated, intrastate ponds" at issue in *SWANCC* whose only connection to interstate commerce was the fact that they were occasionally home to migratory birds.

[4] In *Deaton*, after conducting a thorough review of the CWA, the Fourth Circuit accorded *Chevron* deference to the Corps' construction of the CWA that granted it authority over "distant, nonnavigable tributaries of navigable waters." *Deaton*, 332 F.3d at 709. In *Rapanos*, this court agreed with the Fourth Circuit's holding in *Deaton*. *Rapanos*, 339 F.3d at 452-53. Because waters containing a hydrological connection to tributaries of navigable waters bear a "significant nexus" to navigable waters, as in *Riverside Bayview* and unlike the waters in *SWANCC*, *Chevron* deference is appropriate. The Corps' interpretation of "waters of the United States" to include those waters adjacent to tributaries of navigable waters, that share a hydrological connection with those tributaries, is neither "arbitrary, unreasonable, or manifestly contrary to the statute."

Chevron, 467 U.S. at 843-44, 104 S. Ct. 2778.

E. *Application to this Case*

The Defendants argue that this court should impose a "direct abutment" requirement to CWA jurisdiction over

non-navigable water. In response, the United States asserts that the Defendants waived a defense based on *SWANCC* by not raising it before the district court. It claims that, while the Defendants argued that the CWA does not extend to "isolated waters," they did not make the current argument that the CWA does not extend to "wetlands adjacent to nonnavigable tributaries." However, the United States is splitting hairs, as this is simply part and parcel of the "isolated waters" argument the Defendants made before the district court. Alternatively, the Defendants' current claim falls under the exceptions to the traditional rule that appellate courts will not entertain arguments raised for the first time on appeal because this argument involves a question of law and the factual record has been fully developed below. *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 244 (6th Cir. 1991).

[5] [6] As discussed *supra*, Rapanos' argument regarding *SWANCC* has previously been adjudicated by this court, in a published disposition, and its conclusion is entitled to stare decisis. *See Rapanos*, 339 F.3d at 453. Indeed, Rapanos acknowledged as much during oral arguments. Further, this court's reasoning in that case is supported by the majority of circuits, by the policy of deferring to agency interpretations, and by a careful examination of the relevant Supreme Court cases. There is no "direct abutment" requirement in order to invoke CWA jurisdiction. Non-navigable waters must have a hydrological connection or some other "significant nexus" to traditional navigable waters in order to invoke CWA jurisdiction. Unlike the isolated waters in SWANCC, these waters are interconnected with traditional navigable waters.

Next, the Defendants' argument that the district court did not find that there was a "significant nexus" between the wetlands and the navigable waters is similarly misplaced. The district court found that all three sites contained a hydrological connection to navigable waters and thus fell within the

jurisdiction of the CWA. Specifically, the district court found that

> the Salzburg wetlands have a surface water connection to tributaries of the Kawkawlin River which, in turn, flows into the Saginaw River and ultimately into Lake Huron. Dr. Willard testified that the wetlands at the Salzburg site had a surface connection to the waters of the United States. In 1994, Hal Harrington verified that a surface water connection exists between the Salzburg site and Saginaw Bay.
>
> Further, Hal Harrington, Chief of the Michigan Department of Environmental Quality's Great Lakes Submerged Lands Unit, testified that there was a surface water connection between the Salzburg site and the Saginaw Bay. In 1994 he visited the site. During this visit, he observed carp spawning in a roadside stream on the north side of the property. He followed the flow of the water and "each road crossing with this surface water connection to Saginaw where it entered . . . the river entering Saginaw Bay north of the Bay City State Park [the Kawkawlin River]." An expert for Rapanos, Dr. Straw, testified that water left the site through the Hoppler Drain, which drains into the Hoppler Creek. This drain is immediately north of the Salzburg site.[3]

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[3] In Rapanos' criminal case, this court held that the evidence demonstrated that "the wetlands on Rapanos's land are adjacent to the Labozinski Drain . . ." and noted that contamination of that drain "could affect navigable-in-fact waters." *Rapanos*, 339 F.3d at 453 (discussing a slightly different parcel of land). The Labozinski Drain discussed in the criminal case drains into

(continued...)

Regarding the Hines Road site, the district court noted that

> Dr. Willard testified that the wetlands at the Hines Road site have a surface water connection to the Rose Drain which, in turn, has a surface water connection to the Tittabawassee River. Dr. Willard also described the nature of the surface water connection between the wetlands at Hines Road and the Rose Drain. In October 1994, Dodgers and Zbiciak . . . demonstrated that the interior wetlands have a hydrologic connection with the Rose Drain.
> In addition, Mr. Zbiciak, a representative from the State of Michigan, testified that the wetlands drained into the Rose Drain, which runs along the western side of the site and flows down to the Tittabawassee River. A report by Charlie Dodgers, another representative of the State of Michigan, indicated that the site inspection revealed five locations where water moved into the Rose Drain, as he testified at trial. Rapanos claims that ditches he dug in 1992 were the only cause of a surface water connection to the Rose drain. However, Charlie Dodgers testified that surface runoff occurred naturally "at least seasonally," and one of the United States' exhibits demonstrated surface connections to the Rose drain as early as 1975.

Regarding the Pine River site, the district court noted that "Dr. Willard testified that the wetlands at the Pine River site have a surface water connection to the Pine River, which flows into Lake Huron." The maps utilized by the United States showed

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[3] (...continued)
the Hoppler Drain.

that areas of wetlands on the site were in close proximity to the Pine River (although they did not delineate the specific paths these wetlands would have taken to drain into the river).

[7] Although the Defendants claim that the evidence did not support these conclusions, the record demonstrates that there were hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters. *See Rapanos*, 339 F.3d at 453 ("Because the wetlands are adjacent to the Drain and there exists a hydrological connection among the wetlands, the Drain, and the Kawkawlin River, we find an ample nexus to establish jurisdiction."). Moreover, the Defendants are certainly unable to show that the district court's conclusions were clearly erroneous. *Pledger*, 236 F.3d at 320. The district court was in a far superior position to judge the complicated facts of this case after presiding over the lengthy proceedings and the bench trial. Further,

> [t]he rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a "tryout on the road." *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S. Ct. 2497, 53 L. Ed.2d 594 (1977). For these reasons, review of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule, not the exception.

Anderson, 470 U.S. at 574-75, 105 S. Ct. 1504. The testimony and evidence in the record support the district court's findings. Its conclusions of fact are entitled to substantial deference and they are not "clearly erroneous."

The Defendants also argue that the district court was required to make "subsidiary findings" to support its conclusion that the sites had a hydrological connection to navigable waters, citing *Deal v. Cincinnati Bd. of Educ.*, 369 F.2d 55 (6th Cir. 1966). To the contrary, the district court's opinion, along with the expert testimony regarding the hydrological connection, provides a sufficient basis to examine the district court's findings and supports the determination that its conclusions were not clearly erroneous.

II. Dr. Willard's Testimony

At trial, the United States offered the expert testimony of Dr. Daniel E. Willard. The district court found Dr. Willard to be "eminently qualified" as an expert in wetlands and concluded that his testimony was "highly credible." The Defendants argue that this testimony should have been stricken, or the trial delayed, because Dr. Willard relied upon a supplemental expert witness report that was not disclosed until after trial was underway.

Dr. Willard revised the map he prepared for trial delineating the areas of wetland on the Rapanos' land. After examining the soil analysis from the Defendants' expert and aerial photography, Dr. Willard revised his wetlands maps, removing some of the areas he had previously marked as

wetlands. He did so to be "as conservative and as accurate as [he] could." The new maps were produced in conjunction with Will Bowman, a soils scientist with the Natural Resources Conservation Service of the U.S. Department of Agriculture, and were known as the "Bowman Supplemental Soils Maps." Accompanying the new maps was a five-page supplemental report. The Defendants contend that this late report "made a mockery of the Federal Rules of Civil Procedure," specifically complaining that the disclosure rules specified in Rule 26 were violated. They claim that the district court's denial of their motion for Rule 37 sanctions, based on the failure to disclose, requires remand for a new trial.

The United States points out that the new maps were based on analysis from the Defendants' experts contained in the Pierce report. The version of Rule 26(e) in effect at the time of the trial provided that a party was required to supplement its disclosures "if the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process." The data used in the supplemental report and maps was known to the Defendants, as it was produced by their experts. Because Dr. Willard's previous expert report and maps were available to the Defendants, it seems unlikely that simply incorporating some of the data from the Defendants' own experts, which reduced the computation of wetland areas, qualifies under Rule 26's mandatory disclosure requirements.

[8] [9] [10] Even if we assume that the United States was required to disclose the supplemental results, exclusion of the report and testimony was not the only remedy available to the district court. Rule 37(c) provides sanctions for the failure to comply with Rule 26, including exclusion of evidence. This court reviews for abuse of discretion a district court's ruling on a motion to exclude an expert witness as a sanction under Rule 37 of the Federal Rules of Civil Procedure. *Roberts ex rel.*

Johnson v. Galen of Virginia, Inc., 325 F.3d 776, 782 (6th Cir. 2003); *Toth v. Grand Trunk Railroad*, 306 F.3d 335, 344 (6th Cir. 2002). Rule 37 provides that the trial judge should not exclude expert testimony unless the failure to disclose is both unjustified and harmful. *Roberts*, 325 F.3d at 782; Fed. R. Civ. P. 37(c)(1) 2000 advisory committee's notes ("Even if the failure [to disclose] was not substantially justified, a party should be allowed to use the material that was not disclosed if the lack of earlier notice was harmless."). The non-disclosing party bears the burden of proving that a disclosure was harmless. *Roberts*, 325 F.3d at 782. The aggrieved party, however, must show substantial prejudice before this court will grant a new trial based on an alleged Rule 26(e) disclosure error. *Toth*, 306 F.3d at 344.

[11] In this case, the failure to disclose seems harmless as the Defendants were aware of the data used in the supplemental reports and the revised reports reduced the amount of wetlands found to exist at the sites. Thus, the only changes made between the original disclosed report and the supplemental report were beneficial to the Defendants. In summary, no "substantial prejudice" has been demonstrated.

[12] Even if a trial court determines that Rule 26 has been violated, Rule 37 does not mandate exclusion of evidence. *Roberts*, 325 F.3d at 783-84 (Rule 37(c)(1) "provides several remedies to a district judge who is faced with violations of the mandatory-disclosure provisions of Rule 26. The provision on sanctions explicitly states in pertinent part that 'in lieu of this sanction [of total exclusion], the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions.'"). The district court, after noting its concern with the failure to disclose the supplemental report, concluded that

> the defense should be accommodated and [I] will do so in several ways, [at] the option totally of the defense. Number one is that at the conclusion of the Government's expert witness case, I would certainly give the defense as much reasonable time as they need in order to consult with their experts. I would be more than happy to . . . so that your expert can be prepared without having to order transcripts and so forth, have him or her on a phone conference so that they can hear all that testimony . . . so that you can be prepared and also take some time and recess for as long as you need in order to consult with your expert for cross-examination and if it entails taking whatever time it takes reasonably to be prepared. But I think that we're here to seek the truth, and that's—that's the whole idea of having a trial is to seek the truth. It's not . . . to ambush and everybody should be prepared . . . . But I have to, I think, listen to the testimony to see what really transpired here with the understanding that we're here to seek the truth and that I will give the defense as much opportunity as they need since it's a bench trial and we can take time, and it's important, but not that important that you shouldn't have an opportunity to be able to use your right to cross-examine, to seek the truth.
>
> The district court properly considered the role of the trial, the rights of the parties, and the considerations of the Federal Rules of Civil Procedure in this side-bar.

The Federal Rules of Civil Procedure are not so monolithic as to demand a single outcome for the widely varying circumstances encountered in discovery and trial. They properly recognize the discretion of the trial court to fashion appropriate remedies, taking into account the facts of the case. This case languished for more than five years between the filing

of the Complaint and the 13-day bench trial. It involved complicated factual and legal issues. It was within the district court's discretion to allow the evidence and it significantly allayed any fears of undue surprise by granting the Defendants "as long as they needed" to review Dr. Willard's supplemental report so that they could discuss it with their experts.

Finally, Dr. Willard notified the Defendants during his deposition a few weeks before trial that he was in the process of amending his findings based upon the Pierce report. The Defendants apparently did not object to this until Dr. Willard testified and they never made a motion pursuant to Rule 37(a)(2)(A) to compel discovery. In *Roberts*, this court noted that such inaction by the "surprised" party suggests that the failure to disclose should be considered harmless or justified. *Roberts*, 325 F.3d at 783.

Considering all of the circumstances in this complicated case, the district court's failure to exclude Dr. Willard's supplemental reports cannot be said to be an "abuse of discretion" and its solution for the disclosure problem was entirely appropriate.

III. The Michigan Wetlands Program

The CWA permits states to develop their own water protection permit program to enforce the provisions of the CWA. 33 U.S.C. § 1344(g). This partial delegation provision "gives a state the authority to render a comprehensive federal/state wetland permit decision with the federal government playing the role of the overseer in the consideration of permit applications." *Michigan Peat v. United States Envtl. Prot. Agency*, 175 F.3d 422, 424 (6th Cir. 1999). Michigan, along with New Jersey, has established such a permitting program. 40 C.F.R. §§ 233.70-233.71.

The Defendants claim that Michigan's permitting regulations contain slight variations to the federal statutes. In particular, they cite Michigan's Geomare-Anderson Wetlands Protection Act, which has language defining wetlands that differ somewhat from the Corps' regulations. Mich. Comp. Laws § 324.30301(p). Those wetlands that are not contiguous to the Great Lakes, an inland lake or pond, or a river or stream, and less than five acres in size, are not subject to Michigan's Wetlands Protection Act, unless it is certified that the area's preservation is necessary to protect the natural resources of the state. *Id.* § 324.30301(p)(ii). This five-acre jurisdictional limitation is not found in the CWA or the Code of Federal Regulations. The Defendants argue that it was error for the district court not to make findings of fact regarding the Michigan statute's five-acre limitation, instead focusing solely on the federal regulations.

[13] [14] While the CWA grants states the authority to establish their own clean water regulations, Congress clearly intended for any state program to be at least as broad as the federal program. *See* 33 U.S.C. § 1344(h)(1)(A)-(B). The Geomare-Anderson Wetlands Protection Act is a state statute separate from the CWA. The CWA's provision for state involvement in issuing CWA permits does not delegate authority to the state to alter application of the CWA and the Corps specifically notes that "[a]ny approved State Program shall, at all times, be conducted in accordance with the requirements of the Act and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose." 40 C.F.R. § 233.1(d). Moreover, contrary to the Appellant's assertions, permitting a state to issue CWA permits does not foreclose all federal issuance of CWA permits. *See Michigan Peat*, 175 F.3d at 427 (a case in which the Corps had ultimate authority to issue permit when state permit did not address the concerns of the federal government); 33 U.S.C. § 1344(g)(1) (Corps still issues

permits for waters used in interstate commerce, including adjacent wetlands).

[15] The CWA explicitly provides that, notwithstanding the delegation of authority to the states, nothing in Section 1344 is meant to restrict the Corps' authority to enforce the CWA. 33 U.S.C. § 1344(n). This court has recognized that Section 1344(n) allows the federal government to pursue an action against an offender regardless of whether the state has instituted its own enforcement program, noting that under "the CWA . . . the responsible federal agency retains oversight power to ensure compliance with federal standards." *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation and Enforcement*, 20 F.3d 1418, 1427-28 (6th Cir. 1994); *see also United States v. City of Rock Island*, 182 F. Supp.2d 690, 693-94 (C.D. Ill. 2001); *United States v. Town of Lowell*, 637 F. Supp. 254, 257 (N.D. Ind. 1985). The CWA does not contain any language suggesting that state implementation of the CWA is "in lieu of" federal enforcement and thus any delegation of authority to the state in the CWA does not end a citizen's responsibility to abide by the federal laws and regulations. *Cf. United States v. City of Youngstown*, 109 F. Supp.2d 739, 741 (N.D. Ohio 2000).

In short, there is nothing in the CWA to suggest that by allowing Michigan to enforce portions of the CWA, the Corps was delegating the authority to the state to determine the limitations on CWA jurisdiction. Michigan does not gain the authority to alter the CWA's federal jurisdiction merely by virtue of the fact that it is entitled to administer some portions of the act. In fact, the statute and the accompanying regulations make it clear that state enforcement programs cannot act to weaken the CWA.

Finally, it should be noted that the Corps retains the ultimate authority to deny a CWA permit, even if Michigan is inclined to grant one under its delegation of authority.

Michigan's Administration of Section 404 at 2 (available at http://www.deq.state.mi.us/documents/deq-lwm-wetlands-404admin.pdf); *see also Michigan Peat*, 175 F.3d at 427 (Michigan failed to issue a permit satisfying the federal government's reservations so the Corps retained the sole authority to authorize the issuance of a permit). In certifying Michigan's 404 permitting scheme, Michigan's Attorney General wrote that

> [t]he Water Resources Commission Act governing discharge of pollutants into water of this state includes within its ambit all waters of the State of Michigan. It is, of course, clear that the . . . Wetlands Act exclude from their purview certain lakes having an area of less than 5 acres. Even this problem is, in fact, of no practical matter for a number of reasons. First, it is quite conceivable that a lake under 5 acres would have an affect on interstate commerce so as to imbue it with the distinction of being "water of the United States" and thus subject to the federal permit program.

Thus, Michigan's permitting program properly recognized that a site not falling within the ambit of Michigan's state program could still be within the jurisdiction of the federal program.

IV. Collateral Estoppel

The district court found that Mr. Rapanos should be collaterally estopped from denying liability at the Salzburg site based on the outcome in the criminal case. Both parties note the confusion from relying upon collateral estoppel in this case because (1) the "Salzburg site" referenced in the criminal trial is not completely analogous to the Salzburg site in this case and (2) when the district court entered its findings of fact in 2000, Rapanos had been convicted in his trial and sentenced, but his

appeal was pending, yet when the district court entered its final judgment in February 2003, Rapanos' conviction had been vacated by the criminal trial court and the United States' appeal to this court was pending. The United States notes the difficulty inherent in relying upon collateral estoppel when an appeal is pending.

Regardless, the district court's conclusion regarding collateral estoppel was not necessary for its finding that the Defendants were responsible for CWA violations at the Salzburg site. As discussed *supra*, the district court concluded that the Defendants had discharged fill into the Salzburg site and that the Salzburg site was subject to CWA jurisdiction. A judge may rely upon multiple alternative, but independent rationales for his decision. *See Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 909-10 (6th Cir. 2001) (discussing the effects on collateral estoppel when a decision is based upon two alternative, but independent rationales). In this case, it is unnecessary to determine whether collateral estoppel was appropriate because the district court provided alternate rationales for its findings.

V. The Extent of Unauthorized Filling

Finally, the Defendants contend that substantial evidence did not support the district court's finding that 54 acres of wetlands were illegally filled. They claim that some of the fill used in the district court's calculation was "incidental fallback." The district court concluded that the illegal fill was substantial (covering 54 acres) and not the result of incidental fallback after examining the evidence and hearing the relevant testimony. This conclusion is supported by the evidence and is not clearly erroneous.

CONCLUSION

We AFFIRM the judgment of the district court.

No. 02-1377

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JOHN A. RAPANOS, JUDITH A. NELKIE RAPANOS, PRODO, INC., ROLLING MEADOWS HUNT CLUB, and PINE RIVER BLUFF ESTATES, INC., Defendants.	)	Filed March 24, 2000 Civil Action No. 94-CV-70788-DT HON. BERNARD A. FRIEDMAN

FINDING OF FACT AND CONCLUSIONS OF LAW

I. Introduction

Plaintiff alleges in this matter that defendants have violated the Clean Water Act ("CWA"). Specifically, it is alleged that defendants violated 33 U.S.C. § § 1311 and 1344 by cutting down trees, destroying vegetation, moving and removing soil, dumping sand, building roads and houses, dredging ditches, installing drain tiles, and engaging in other construction activities at six sites where protected wetlands are present (or where protected wetlands were present before defendants

destroyed them) without a permit.[1] Plaintiff also alleges that defendant John Rapanos violated 33 U.S.C. § 1318(a) by failing to respond to a request for information regarding one of the sites; and that all of the defendants violated 33 U.S.C. § 1319(a) by failing to comply with two administrative compliance orders. Plaintiff seeks injunctive relief, civil penalties, and costs.

After a court-ordered special mediation failed to achieve a settlement, the matter was tried to the bench. The central issues at trial were the extent to which, if at all, protected wetlands existed at the five sites; and the extent to which, if at all, defendants unlawfully disturbed them. The court now submits its findings of fact and conclusions of law in accordance with Fed. R. Civ. 52. In short, the court concludes that plaintiffs proved by a preponderance of the evidence that jurisdictional wetlands existed at three of the five sites at the time defendants engaged in their earth-moving and other construction activities. Plaintiff also proved that defendants destroyed substantial amounts of jurisdictional wetlands at these sites.

II. Relevant Statutes and Regulations

Under section 301(a) of the CWA, 33 U.S.C. § 1311(a), no person may discharge any pollutant except in accordance with restrictions established under other provisions of the act. The term pollutant includes dredged spoil, biological materials, rock, sand, and cellar dirt, and the phrase "discharge of a pollutant" means any addition of any pollutant to navigable

[1] Throughout this litigation, the parties have referred to the six sites as the Salzberg site; the Hines Road or Northwood site; the Pine River site; the Freeland site; the Tittabawassee River or Mapleton site; and the Jefferson Avenue site. Prior to trial, the court granted summary judgment for defendants as to the Jefferson Avenue site. All of the sites are located near Midland, Michigan, in Bay County, which is within the Eastern District of Michigan.

waters from a point source. See 33 U.S.C. § 1362 (6), (12). Navigable waters are defined as "waters of the United States." See 33 U.S.C. § 1362 (7). Thus, plaintiff must prove by a preponderance of the evidence that each site contains "waters of the United States," that "pollutants" were "discharged" into those waters that the defendants are the "persons" responsible for the discharge, and that the defendants lacked a permit.

The U.S. Army Corps of Engineers ("Corps") and Environmental Protection Agency ("EPA") definitions of "waters of the United States" include certain wetlands. See 40 C.F.R. § 230.3(s)(1)-(7). Wetlands are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 33 C.F.R. § 323.2(c). Federal jurisdiction over wetlands is permitted where the wetlands are "adjacent to" waters of the United States, or where destruction of the wetlands has an adverse effect on interstate commerce.

In addition to the proscription against addition of a pollutant contained in section 301 of the CWA, 33 U.S.C. §1319, the CWA also contains a requirement that the discharge of dredged or fill material into waters of the United States be permitted by the Secretary of the Army acting through the Chief of Engineers (i.e., the Corps). The Corps' regulations define "fill material" to mean "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." 33 C.F.R. § 323.2(e).

The determination whether a particular area is a "wetland" for purposes of the CWA is accomplished by using the U.S. Army Corps of Engineers Wetlands Delineation Manual,

Technical Report Y-87-1 ("1987"). The 1987 Manual presents technical guidelines for identifying wetlands and distinguishing them from non-wetlands, provides methods for applying the technical guidelines, and provides supporting information useful in applying the technical guidelines.

The 1987 Manual outlines a "three-parameter approach" for identifying wetlands. This approach requires examination of an area's vegetation, soils and hydrology. The parties agree that this approach must be used to identify and delineate wetlands.

The wetland vegetation criterion is met when there is a prevalence of vegetation typically adapted to survive in conditions where the frequency and duration of inundation or soil saturation produces saturated soil conditions that exert a controlling influence on a plant species present. The assessment of whether a given species of plant is typically adapted for life in saturated soil conditions is made in part by referring to the Wetland Plant List compiled by the U.S. Fish and Wildlife Service. This plant list assigns an "indicator status" to each species of plants. The wetland Plant List uses indicator status categories of "obligate wetland" ("OBL"), "facultative wetland" ("FACW"), "facultative" ("FAC") "facultative upland" ("FAC-UP), and "upland" ("UP"). These categories reflect biological assessments of the probability of a given plant occurring in a given environment. Thus, an obligate wetland plant is defined as a plant that almost always occurs in wetlands, under natural conditions, but may also occur in non-wetlands. To be classified as an obligate wetland plant, its estimated probability of occurring in wetlands is greater than 99%, with an estimated probability of occurring in non-wetlands of less than 1%. A "facultative wetland" plant is one which usually occurs in wetlands, but also occurs in non-wetlands (estimated probability of occurrence in wetlands of 67%-99% and estimated probability in non-wetlands of 1%-

33%). A "facultative" plant is sometimes found in wetlands (estimated frequency of 34%-66%), but is also found in non-wetland areas. A "facultative upland" plant is one that is seldom found in wetlands (estimated frequency in wetlands of 1-33%). An "upland" plant has an estimated probability of occurring in wetlands of less than 1%.

To meet the vegetation criterion of the three-parameter test, one determines what plants are prevalent. The 1987 Manual indicates that wetlands vegetation is prevalent in an area when more than 50% of the dominant species comprising the plant community or communities are obligate, facultative wet, or facultative, i.e. typically adapted for life in saturated soil conditions.

The 1987 Manual also requires an examination of the soils present on a site to determine whether they are "hydric." Hydric soils are soils that are saturated, flooded, or ponded long enough during the growing season to become anaerobic, or lacking in oxygen, in the upper part. Soils are characterized and their color, structure, and texture are evaluated. Certain features of the soil help to determine whether a given soil sample is hydric. Hydric soils can be either peat/muck, mineral, or sandy. Mineral hydric soils are subjected to periodic saturation sufficient to exhibit specific soil colors. These colors are defined and standardized in the Munsell Soil Chart.

The third parameter of the three-parameter test is the hydrology of the land. The 1987 Manual states at pages 39-40 that "[t]he term 'wetland hydrology' encompasses all hydrologic characteristics of areas that are periodically inundated or have soils saturated to the surface at some time during the growing season. . . . Hydrology is often the least exact of the parameters, and indicators of wetland hydrology are sometimes difficult to find in the field. However, it is essential to establish that a wetland area is periodically inundated or has

saturated soils during the growing season." The 1987 Manual also indicates that an area has wetland hydrology if it is inundated or saturated to the surface continuously for at least five percent of the growing season in most years. Indicators of wetland hydrology include saturation, flooding, or ponding of the area, as well as indirect evidence such as watermarks on trees. Wetland hydrology can be demonstrated by surface water inundation or flooding or groundwater saturation within twelve inches of the surface during the growing season.

III. Facts Relevant to All Defendants

There is no dispute as to the following facts: Defendant John A. Rapanos ("Mr. Rapanos") is the president and sole shareholder of defendant Prodo, Inc. ("Prodo"), and has been since at least since 1980. Defendant Judith A. N. Rapanos ("Mrs. Rapanos") is the president and sole shareholder of defendant Pine River Bluff Estates, Inc. ("PRBE"). None of the defendants had a permit issued to it under the CWA to discharge pollutants into any water of the United States.

IV. Findings of Fact as to the Sites at Issue in this Case

A. The Salzburg Site

In a criminal proceeding, defendant John Rapanos was convicted of violating section 301(a) of the CWA, 33 U.S.C. § 1311(a), for knowingly discharging pollutants into waters of the United States without a permit at the Salzburg site during the time periods of December 1988 to November 1989, and December 1989 to October 1991. He was sentenced on December 2, 1998, and the judgment was entered on that date. See United States v. Rapanos, 93-CR-20023-DT (E.D. Mich.). Although the criminal conviction did not include a jury determination of the number of acres of wetlands Mr. Rapanos

filled, he is collaterally estopped from denying his liability at the Salzburg site.

1. Vegetation

The presence of wetland vegetation at the Salzburg site was established by lay testimony, expert testimony, photographs and other scientific evidence. Steve Sadewasser, and employee of the State of Michigan who is trained in wetland identification, reported the presence of hydrophytic vegetation at the Salzburg site in 1989. The locations of this vegetation were noted by a survey crew. Sadewasser found areas with remnant vegetation, and used aerial photography, soil boring data, the county soil survey, and hydrological observations to determine that the remnant areas were representative of broader areas on the site.

Hal Harrington, an employee of the State of Michigan trained in wetland identification, also observed what appeared to be a scrub/shrub wetland in the "superstructure" portion of the site in March 1989.[2]

Charles Dodgers, an employee of the State of Michigan trained in wetland identification, found that the dominant plant species in July 1989 were sedges, rushes, and water plaintain. Dodgers observed aquatic milkweed, an OBL plant, in August 1989.

Dr. Daniel E. Willard was plaintiff's wetlands expert witness. He is eminently qualified in this area and his testimony was highly credible. Dr. Willard reviewed and relied upon the vegetation data gathered by Sadawasser in 1989 and

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[2] The "superstructure" is a forty acre portion of the Salzburg site bounded on the east by Flajole Road, and which resembles the superstructure of a ship when the site is viewed from above.

the vegetation analysis reported by Dr. Stephenson in the 1990s and concluded that the vegetation criterion was met at the Salzburg site.

2. Soils

The presence of hydric soils at the Salzburg site was also established by testimony and documentary evidence. Dodgers observed deep, mucky soils in the center of the site. The evidence was that mucky soils consist of organic material that does not decompose due to the present of water. Sadewasser observed very dark, organic, peat-like soil in the "superstructure" portion of the site in November 1989. Harrington also observed dark soils throughout the property in March 1989.

Dr. Willard examined the data obtained in November 1989 by Martin Kroell. Kroell collected soil samples at various points on the Salzburg site and reached conclusions regarding the nature of the soil at those points. The exact location of each of Kroell's soil boring data points was identified by a survey crew and placed on a diagram of the site. Dr. Willard also examined the soil data gathered by Dr. Pierce and other experts retained by Mr. Rapanos. Dr. Willard also had the benefit of the soil point descriptions made by soil scientist Will Bowman. Defendants presented soil data through Dr. Robert Pierce and Mr. Blake Parker. Plaintiff's and defendants' evidence agreed substantially as to the location of hydric and non-hydric soils.

The evidence presented by Dr. Willard, who reviewed and observed the work of Bowman and reviewed the data gathered by other soil experts, showed that the soils that were present at the Salzburg site exhibited field indicators of hydric soils as described in the 1987 Manual, such as gleyed or low chroma colors, high organic content in the surface layer in sandy soils, organic streaking in sandy soils, and sulfidic odor. These data

are sufficient to support Dr. Willard's conclusions as to the extent to which the soils at the Salzburg site are hydric.

3. Hydrology

The hydrology criterion for identifying wetlands was also met at the Salzburg site. Dr. Frederick Glenn Goff, a wetlands scientist, observed buttressed root systems in low areas of the site, water lines, and orientation of vegetation swept by water flow. Dr. Goff also observed running water, both on the ground and in ditches. In certain areas, Dr. Goff observed both innundation and saturation to the surface during the initial portion of the growing season. He specifically observed that wetlands adjacent to ditches were not being effectively drained.

Charles Dodgers observed a 30-foot wide area of standing water in May 1989. He observed matted areas and buttressed tree roots in August 1989, both of which are indications of standing water. Dodgers also observed water marks and stains ten to twelve inches high on trees in November 1989. The evidence was that such water marks indicate the level at which water stands, and take a number of years to develop. Dodgers also observed mucky soils, which consist of organic material that does not decompose due to the presence of water.

Dr. Hendrik Haitjema gave expert testimony regarding the probable groundwater levels, prior to construction, at the Salzburg, Hines Road and Pine River sites. Dr. Haitjema has a Ph.D. degree with a specialty in groundwater flow modeling. He has taught, performed research, published articles, and consulted in groundwater hydrology. He is eminently qualified to testify in this area, and the court found his testimony to be fully credible.

Dr. Haitjema analyzed whether the ground water table would be likely near the terrain surface or at the terrain surface.

He considered the topography as he expected it to be in July 1988, as well as groundwater monitoring well data. Dr. Haitjema rendered his conclusions using conservative assumptions so as not to overestimate the elevation of the groundwater table. He concluded that the groundwater likely was at or near the land surface for 21 days over a significant portion of the Salzburg site. The court finds that the groundwater modeling Dr. Haitjema performed has a reasonable degree of accuracy in terms of average conditions, and the court accepts and adopts his conclusion regarding the nature of the groundwater at the Salzburg site.

Dr. Willard also concluded that conditions at the Salzburg site met the technical requirement for wetlands hydrology. The expert testimony of Drs. Willard and Haitjema showed that the water table and zone of the soil that is saturated extend to the root zone of the prevalent plant species during the growing season. Dr. Willard also relied in part on a site visit and on the observations of contemporaneous observers.

The defendants' evidence regarding wetland hydrology consisted principally of the testimony of Drs. Thomas Straw and Robert Pierce. Their credibility was weakened by the fact that they did not review testimony from witnesses who were familiar with conditions at the site prior to defendants' construction activities. Dr. Pierce did not investigate whether there were persons who could have told him if there was surface inundation during the growing season at the Salzburg site prior to construction. He did not consult with Mr. Rapanos, who would have had first-hand knowledge about conditions at the site. In addition, the groundwater well data that Dr. Pierce used to determine the groundwater level were unreliable because they were not corrected to the original, pre-construction ground surface. Dr. Straw likewise failed to consider whether monitoring wells at the site were dug through fill.

4. <u>Conclusion as to the existence and Extent of Wetlands at the Salzburg Site</u>

Dr. Willard concluded that as of July 1988, there were 28 acres of wetlands meeting the criteria of the 1987 Manual at the Salzburg site. In addition to the evidence noted above, this conclusion was also based on his work with Dr. John Estes, a photo-interpreter, who assisted Dr. Willard in analyzing aerial photographs of he Salzburg site. The court agrees with Dr. Willard's conclusion and finds that 28 acres of wetlands were present at the Salzburg site, as indicated in plaintiff's Exhibit 124(j), at the time of defendants' construction activities began in 1988.

5. <u>Federal Regulatory Jurisdiction</u>

The evidence at trial amply established that the wetlands at the Salzburg site are "jurisdictional wetlands," that is, that they are subject to the provisions of the CWA. The evidence indicated that the Salzburg wetlands have a surface water connection to tributaries of the Kawkawlin River which, in turn, flows into the Saginaw River and ultimately into Lake Huron. Dr. Willard testified that the wetlands t the Salzburg site had a surface water connection to the waters of the United States. In 1994, Hal Harrington verified that a surface water connection exists between the Salzburg site and Saginaw Bay. Defendants' expert, Dr. Straw, agreed that all of the water leaves the Salzburg site through the Hoppler Drain.

Dr. Willard also testified that the Salzburg site provided migratory bird habitat for, among other birds, Canadian geese and great blue herons. Dr. Goff observed migrating songbirds on this site in th spring of 1989. In 1994, Harrington witnessed carp spawning in a ditch immediately north of the Salzburg site, indicating a direct surface water connection to the Saginaw Bay.

Further, Dr. Clinton Oster testified as to the interstate commerce effects. He testified that the lost functions of these wetlands, including migratory bird habitat, water quality enhancement and flood control, have interstate impacts. Dr. Oster also testifies that the conversion of wetland to upland had an impact on interstate commerce. The court accepts this testimony and finds that the loss of wetlands at the Salzburg site had an effect on interstate commerce.

6. <u>The Discharge of Pollutants</u>

The evidence at trial overwhelmingly established the "discharge of pollutants" within the meaning of the CWA at the Salzburg site. This discharge took the form of extensive earthmoving activities at the site, which were accomplished primarily by Pat's Gradall Services, Inc. ("Pat's Gradall") and Three-S Construction, Inc. ("Three-S").

Beginning in 1988, Pat's Gradall performed extensive land-clearing work at this site. These activities were accomplished with a backhoe, bulldozer, an excavator, and a "Roto clear." Three-S began work at this site in April 1989. This company's activities included clearing land, removing stumps, clearing brush, moving dirt, leveling ground, cleaning existing ditches, pushing off high spots and filling in low spots, and pulling in a disk with a bulldozer. Three-S used heavy equipment including a backhoe, a loader, and a bulldozer.

Construction records introduced at trial indicated the dates when construction work was performed at the Salzburg site and the amounts of money spent therefor. From July 1988 to December 1988, Pat's Gradall was paid approximately $30,000 for its work. Thereafter, most of the work was preformed by Three-S. The total amount paid to Pat's Gradall and Three-S for work at this site was nearly $350,000.

Several witnesses testified to the nature and extent of the construction activities at the Salzburg site. In March 1989, Hal Harrington observed that there had been clearing, grubbing, construction, and land balance activities at this site. He saw scalped earth and piles of wind-rowed vegetation, ten feet high and fifteen feet wide, in depressional areas between sandy ridges. This scalping involved pushing earth.

In May 1989, Charles Dodgers drove by the Salzburg site and observed a pile of bright yellow sand in the middle of the site. He had walked through the entire site in March 1989 and saw no sand fill on the site at the time. In July 1989, Dodgers observed sand dumped over black, organic soil. In that month, Dodgers saw that more sand fill had been deposited since May 1989. He observed a front end loader place sand into a dump truck, which took the sand and dumped it in a low area where he had previously observed a forested wetland. Dodgers observed sand piled and spread in other areas of the site where there had not been sand in May 1989. He also saw "grubbed" topsoil in July 1989, where vegetation had been uprooted and the topsoil had been disturbed. Dodgers estimated that up to 20 acres of land was freshly covered with sand.

In July 1989, Hal Harrington visited the Salzburg site and saw sand fill over dark soils which did not have sand fill in March 1989. The windrows and scalped earth he had observed in March were still visible. The scrub/shrub wetland Harrington had observed in the "superstructure" area of the site in March 1989 was now gone.

Dodgers returned to the site in August 1989. He observed that more sand had been dumped and spread. He also saw a rototiller tearing up vegetation and disturbing the topsoil.

Steve Sadewasser inspected the site in November 1989. So much sand had been added to or spread around that the site was

"devastated." In Sadewasser's words, "It looked like nothing more than a beach, essentially no vegetation." Sadewasser found fresh spoils and sand sidecast immediately adjacent to and on top of wetland vegetation such as cattails and rushes. At one point, Sadewasser observed a pocket of cattails surrounded by ten inches of sand fill, with heavy equipment tracks still visible in the sand. Each of these locations are close to or within wetland areas identified by Dr. Willard.

The areas in which construction activities took place at the Salzburg site are not in dispute. Plaintiff's expert, Dr. John Estes, testified that plaintiff's Exhibit 124(m) identifies the surface disturbance (i.e., material moved on the surface of the land) that occurred from the beginning of construction until 1988. Soil samples also demonstrated the existence of fill in wetland areas at this site.

Dr. Willard testified that the fill he observed could not be attributed solely to incidental fallback. Dr. Willard testified that at the Salzburg site, 22 acres of wetlands were lost to the lateral movement of soils between 1988 and 1997. The locations of these lost wetlands are shown on plaintiff's Exhibit 124(n). The court found Dr. Willard to be a highly credibly witness and the court accepts his testimony as to the extent of the loss of wetlands at the Salzburg site.

7. The Responsible Persons at the Salzburg Site

The evidence clearly showed that defendant John Rapanos was the person responsible for the discharge of pollutants at the Salzburg site. At all times relevant to this action, Mr. Rapanos owned the Salzburg site. He also worked at the Salzburg site and generally directed and had control over the work performed at the site by Pat's Gradall and Three-S. Mr. Rapanos authorized payment for, and he or his sole proprietorship paid for, the work of Pat's Gradall and Three-S at the Salzburg site.

Mr. Rapanos' disregard for the protected status of wetlands at the Salzburg site is apparent from his dealings with the Michigan Department of Natural Resources ("MDNR") and his own wetlands expert, whom he retained to determine the location and extent of wetlands at this site. In December 1988, Mr. Rapanos requested that the MDNR inspect the Salzburg site in order to discuss with him the feasibility of building a shopping center there. Hal Harrington informed Mr. Rapanos that there were likely regulated wetlands on the Salzburg site and sent him a permit application. Harrington toured the site with Mr. Rapanos in March 1989, and again informed him that there were likely regulated wetlands on this site, but that the land could still be developed if the wetlands were delineated.

Mr. Rapanos hired Dr. Goff, a wetlands consultant, to delineate the wetlands. Dr. Goff toured the site with Mr. Rapanos, told Mr. Rapanos that there were wetlands on the site, and pointed out to him some of the wetlands that were in low areas. In April 1989, Dr. Goff concluded that there were between 48 and 58 acres of wetlands on the Salzburg site. He presented his findings to Mr. Rapanos in both a written report and a map. Dr. Goff testified that Mr. Rapanos instructed him to destroy the report and map, including any copies and any references to Mr. Rapanos in his files. Mr. Rapanos threatened to "destroy" Dr. Goff if he did not destroy the wetland report, and refused to pay Dr. Goff unless and until he complied. Mr. Rapanos offered to burn the report himself, and stated that he would bulldoze the site flat.

The MDNR sent Mr. Rapanos a cease and desist letter in July 1989, but Mr. Rapanos did not respond. MDNR representatives attempted to inspect the Salzburg site in August 1989, but Mr. Rapanos refused to allow them to come onto the property. At a subsequent meeting in Mr. Rapanos' office, Mr. Rapanos again refused to grant the MDNR representatives access and asserted that he intended to farm the land on this

site. The State again informed Mr. Rapanos that a permit was required, even for farming. Harrington returned to the Salzburg site in 1991 and observed that tiles had been placed on the site to drain subsurface water.

As noted above, Mr. Rapanos was convicted at his criminal trial of violating section 301(a) of the CWA, 33 U.S.C. § 1311(a), for knowingly discharging pollutants into waters of the United States without a permit at the Salzburg site during the time periods of December 1988 to November 1989, and December 1989 to October 1991. Even if this conviction did not collaterally estop Mr. Rapanos from denying his liability in this action for disturbing protected wetlands at the Salzburg site, his liability therefor was independently established by the proofs presented in the present case.

B. <u>The Hines Road (Northwood) Site</u>

The evidence clearly established the existence and destruction of wetlands at the Hines Road (Northwood) site as well.

1. <u>Vegetation</u>

The evidence at trial clearly showed that the vegetation criterion of the three parameter test was satisfied at the Hines Road site. In April 1992, Charles Dodgers inspected the Hines Road site and observed swamp white oak, an OBL species, and sensitive fern, a FAC-W species. In May 1992 Dodgers' supervisor, Robert Zbiciak, who is also trained in wetland identification, visited the site. He walked along the "C" ditch, which extends off the Rose Drain into the site's interior, from the north-south bend in the C ditch north through the central portion of the site. He observed forested scrub/shrub wetland vegetation in these areas. In March 1994, Dodgers again visited the site and recorded the areas where he observed sensitive fern

and wool grass. He also observed green ash, swamp white oak, and bullrush.

In October 1994, the State of Michigan conducted an inspection of the Hines Road site pursuant to a search warrant and documented the existence of wetland plant communities along a series of transects throughout the property. In June and July of 1997, a multi-disciplinary team of federal, state and private sector investigators led by Brooks Williamson conducted an inspection of the Hines Road site and identified numerous species of wetland vegetation. This team documented that the federal criterion for wetland vegetation was met at eleven of 26 sample locations.

Dr. Willard used the same general approach at the Hines Road site as he did at the Salzburg site in identifying wetlands and delineating their scope. Dr. Willard worked with Dr. John Estes, a photo-interpreter, to determine the spatial extent of baseline wetlands. Dr. Willard also independently reviewed aerial photographs. Dr. Willard also reviewed and relied upon the data from the 1994 state inspection and the data from the 1997 Williamson inspection in concluding that the vegetation criterion was met at the Hines Road site.

2. <u>Soils</u>

In his April 1992 visit to this site, Dodgers observed areas with dark, organic soils and gleyed sand, which indicates wetness. He also observed mucky conditions in the center of the site, and peat-like soils, which had less decomposition due to the presence of water. In his May 1992 visit, Zbiciak also observed organic, muck soils exposed along the C ditch. The state's 1994 inspection of the Hines Road site also documented the existence of hydric soils along a series of sample lines. The 1997 Williamson inspection of the Hines Road site identified the existence of hydric soils throughout the site and

documented that hydric soils were present at 19 of 26 sample locations. Dr. Willard reviewed and relied upon the data from the 1994 state inspection and the data from the 1997 Williamson inspection, as well as the data supplied by Dr. Pierce and his colleagues, in concluding that the hydric soil criterion was met at the Hines Road site.

One of defendants' experts, William Parker, indicated he believed the soil data were insufficient to show the existence of wetlands in 13 areas identified as such by plaintiff's experts. However, Parker did not have any data himself for these areas, and he did not know whether or not the plaintiff's experts investigated these areas without digging pits or taking soil borings. Parker did not question any of the plaintiff's soil data points at the Hines Road site, and he did not dig any soil pits himself or make any data sheets or record the colors he observed using the Munsell chart. Accordingly, the court rejects Parker's testimony regarding the alleged lack of evidence of hydric soils at the wetlands locations identified by plaintiff's experts.

3. <u>Hydrology</u>

In April 1992, Dodgers observed standing water in the center of the site. In his May 1992 visit, Zbiciak observed extremely wet conditions along the C ditch, creating soupy, wet areas. In March 1994, Dodgers again observed standing water adjacent to a ditch. The 1997 Williamson inspection of the Hines Road site identified the existence of the requisite wetland hydrology throughout the site.

There was extensive expert testimony demonstrating that the hydrology criterion of the three-parameter test was satisfied at the Hines Road site. Dr. Willard reviewed and relied upon the data fro the 1997 Williamson inspection in concluding that the hydrology criterion was met at the Hines Road site. Dr.

Willard also relied upon the analysis performed by Dr. Haitjema. Dr. Haitjema used the same general approach at the Hines Road ste as described above for the Salzburg site. He concluded that the groundwater table was likely to be at or near the land surface for 21 days over a significant portion of the site and that there was saturation to the surface in significant portions of the majority of the site in approximately 1989.

The credibility of defendants' experts, Drs Pierce and Straw, was undermined by several factors. As at Salzburg, neither of these defense experts investigated whether there were witnesses to pre-construction site conditions who could have supplied information regarding wetland hydrology. Nor did defendants' experts make a systematic effort to determine whether the surface elevation of the groundwater wells was the same as prior to construction. Dr Pierce conceded that there was a wetland in the center of the Hines Road site, but only disputed its size.

Dr. Straw testified that the Drain Commissioner's cleaning and deepening of the Rose Drain would have drained "extensive" portions of the site, but he conceded that he did not have sufficient data to say how many acres were drained, or to quantify the effect of the Rose Drain. For example, Dr. Straw testified that if the drain were deepened by five feet, the groundwater table immediately adjacent to the drain would go down five feet, and the watertable elsewhere on the site would also go down, but he could not say by how much, other than to opine that the effect would be "marked," but less than five feet. While Dr. Straw stated that the internal ditches at the Hines Road site were "very effective" in draining areas of the site, he conceded that he had not quantified the effect of either the Rose Drain or the internal ditches, and that he could not quantify the influence of any drain at the site. Further, as at the Salzburg site, Dr. Straw did not consider whether monitoring wells were dug through fill in coming to his conclusion that the site lacked

the requisite wetland hydrology. In contrast, federal investigators did take the depth of fill into consideration when evaluating whether water was present within one foot of the surface at various locations at the Hines Road site.

4. Conclusion as to the Existence and Extent of Wetlands at the Hines Road Site

Dr. Willard testified that, as of November 1991, there were 64 acres of wetlands meeting the criteria of the 1987 Manual at the Hines Road site. These wetlands are shown on plaintiff's Exhibit 131(j). The court found Dr. Willard to be highly credible and specifically adopts his findings as to the size and location of wetlands at the Hines Road site.

Defendants' expert, Dr. Pierce, conceded the presence of at least some wetlands at the Hines Road site in early 1992. His opinion that Dr. Willard overestimated the size of wetlands is inadequately supported. Nor did Dr. Pierce make his own determination as to the extent of wetlands at the Hines Road site.

5. Federal Regulatory Jurisdiction

Dr. Willard testified that the wetlands at the Hines Road site have a surface water connection to the Rose Drain which, in turn, has a surface water connection to the Tittabawassee River. Dr. Willard also described the nature of the surface water connection between the wetlands at Hines Road and the Rose Drain. In October 1994, Dodgers and Zbiciak participated in the execution of a search warrant at the Hines Road site. During that search, the state established transects, or lines, which identified and traced wetlands from the Rose Drain into the interior of the site. The transects followed the flow of the water, and demonstrated that the interior wetlands have a hydrologic connection with the Rose Drain.

Further, Dr. Willard testified that the Hines Road site provides actual migratory bird habitat for, among other birds, Canadian geese and great blue herons. At the Hines Road site, as at the Salzburg site, Dr. Oster testified that the lost functions of these wetlands—migratory bird habitat, water quality enhancement, and flood control—have interstate effects. Dr. Oster testified that the conversion of wetland to upland also had an impact on interstate commerce. Therefore, the evidence established that the destruction of the Hines Road wetlands had an effect on interstate commerce.

6. The Discharge of Pollutants

The evidence at trial amply documented the discharge of pollutants into wetlands at the Hines Road site. The construction work at the Hines Road site consisted principally of deepening, widening and extending drains (and building roads alongside them with fill from the drains and pushing sidecast materials into adjacent wetlands) and cultivation for crops, and involved ditching, earthmoving, planting, seeding and plowing. The work was performed by Prodo, Pat's Gradall, Bilacic Trucking, Inc., and Fisher Contracting.

The work performed by Bilacic Trucking at the Hines Road site began in November 1991, and included digging ditches, using an excavator bucket to pull material out of ditches, and spreading that material on the ground. Bilacic also sidecast material from the drains, and used that material to build roads and to widen existing roads. In addition, Bilacic removed trees to make room for the spoils. Prodo's work at this site included cleaning washouts, putting in culverts, taking off topsoil, pushing sand around, planting, seeding, discing, and cleaning ditches. The work was performed with equipment including and excavator, bulldozers, scrapers and back hoes, and a tractor, disc, plow and spreader.

Plaintiff's Exhibit 74 fairly reflects the times that work was performed and the money that was spent as it relates to construction activity at the Hines Road site. The evidence indicates that from November 1991 to December 1997, Pat's Gradall, Bilacic Trucking, Fisher Construction, and Prodo were paid approximately $158,000 for earth moving work.

In April 1992, Dodgers observed spoil that had been removed from interior ditches (i.e., not the Rose Drain) and dropped next to the ditches. He confirmed this during a low level flight over the sight in July 1992. In July 1993, Dodgers again took low level aerial photographs of the site, which documented additional sidecasting from the construction of additional ditches in the center of the site, and which document that equipment was used to spread spoils in addition to sidecasting. In May 1992, Zbiciak also observed sidecast spoils along the C ditch. The sidecast material was fresh and had been placed there that year. In June 1997, Zbiciak returned to the site and noticed that new fill had been placed in areas that were undisturbed in 1994.

In March 1994, Dodgers again visited the Hines Road site and documented more newly dug ditches and spoils from those ditches sidecast and spread into wetlands. At lease some of the spoils were sidecast into areas containing obligate vegetation. At that time, he also observed that the central portion of the site, which was wooded in 1992 but was cleared by 1994, had been tilled and red clover (a pasture plant) had been planted.

Dr. Willard testified that at the Hines Road site, 17 acres of wetlands were lost due to the lateral movement of soils between November 1991 to present. Some of the wetlands were lost between November 1991 and 1994, while others were lost between 1994 and 1997. The locations of these lost wetlands are shown on Plaintiff's Exhibits 131(1) and 131(n). The court specifically adopts Dr. Willard's testimony

concerning the location and extent of the loss of wetlands at the Hines Road site.

In 1994, Dodgers estimated that three to five acres of wetlands had been filled by sidecast, and that an additional 10-15 acres of wetlands had been filled by spreading spoils. Soil boring data obtained by plaintiff at the Hines Road site reflects considerable added fill in a number of former wetland locations. Defendants' expert, Mr. Parker, agreed that there is fill over hydric soils at the Hines Road Site. Dr. Willard testified that the fill he observed could not be solely attributed to incidental fallback.

7. <u>The Responsible Persons at the Hines Road Site</u>

The Hines Road site consists of four parcels. Defendant Prodo owned all four parcels between 1992 and 1997. Mr. Rapanos arranged for the work performed at Hines Road site and had control over that work. He requested and generally directed Pat's Gradall's work and Bilacic Trucking' work. Prodo also arranged for the work performed at the Hines Road site and had control over and directed the work, in whole or in part. Prodo paid for Pat's Gradall's work and hired and paid for Bilacic Trucking's work.

The MDNR sent a cease and desist letter to the Rolling Meadows Hunt Club on July 7, 1992. Mr. Rapanos asked the Equalization Office to list Rolling Meadows Hunt Club as the site's owner, and the Equalization Office gave Dodgers that name and address. The cease and desist order was not complied with, and work continued at the site thereafter.

C. The Pine River Site

As at the Salzburg and Hines Road sites, plaintiff produced convincing evidence to demonstrate that all three criteria of the three-parameter test were met at the Pine River site.

1. Vegetation

In October 1992, Dodgers observed wetland vegetation such as royal fern, sensitive fern, ash, and red maple. Williamson's 1997 inspection of the Pine River site identified numerous species of wetland vegetation still growing at the site and documented that the federal criterion for wetland vegetation was met at 30 of 46 sample locations.

At the Pine River site, as at other sites, Dr. Willard gave spatial effect to point data. He used aerial photo-interpretation from Dr. Estes as well as data collected by Williamson. Defendants' expert, Dr. Pierce, had no factual data to show that hydrophytic vegetation was not present in the claimed wetland areas.

2. Soils

The 1997 Williamson inspection of the Pine River site also identified the existence of hydric soils throughout the site and documented that hydric soils were present at 35 of 46 sample locations. As at other sites, at Pine River, Dr. Willard used point data gathered by Williamson.

Defense expert Parker agreed that there are hydric soils at the Pine River site, both within and outside of the ditches, but he did not indicate or record the locations where he found the hydric soils outside of the ditches. As at the Salzburg and Hines Road sites, Parker questioned some of the wetlands identified by the plaintiff's experts at the Pine River site, but he

did not have any counter-data to show that there are not hydric soils in these areas.

3. Hydrology

The 1997 Williamson inspection of the Pine River Site showed that wetland hydrology was present at 24 of 46 sample locations. Dr. Willard relied on the data collected by Williamson. Dr. Willard also relied on Dr. Haitjema, who used the same general approach at the Pine River site as described above for the Salzburg and Hines Road sites. Dr. Haitjema concluded that the groundwater table was likely to be at or near the land surface for 21 days over a significant portion of the site.

In contrast, Dr. Pierce's team did not attempt to determine quantitatively the contribution, if any, of surface water to the wetland technical guideline for hydrology at the Pine River site. Dr. Pierce presented no factual data as to whether there was sufficient ponding to meet the technical guideline for hydrology.

Dr. Straw testified that the historical ditches (i.e., pre-1992) at the Pine River site had a "pervasive" impact on hydrology, but he conceded that he had no data quantifying the impact. He conceded that swales at the site could have held water, but he did not know how much water or for how long. He also conceded that some portions of the site had wetland hydrology in 1992.

4. Conclusion as to the Existence and Extent of Wetlands at the Pine River Site

Dr. Willard testified that, as of April 1992, there were 49 acres of wetlands meeting the criteria of the 1987 Manual at the Pine River site. These wetlands are shown on plaintiff's

Exhibit 134(k). The court found Dr. Willard to be highly credible and specifically adopts his conclusion as to he extent and location of wetlands at the Pine River site.

5. Federal Regulatory Jurisdiction

Dr. Willard testified that the wetlands at the Pine River site have a surface water connection to the Pine River, which flows into Lake Huron. By contrast defendants expert, Dr. Pierce, did not analyze all of the areas identified by Dr. Willard as wetlands to see if there was a surface water connection to the Pine River.

Dr. Willard also testified that the Pine River site provided actual migratory bird habitat for, among other birds, Canadian geese and red-tailed hawks. At the Pine River site, as at Salzburg, Dr. Oster testified that the lost functions of these wetlands—migratory bird habitat, water quality enhancement, and flood control—have interstate effects. Dr. Oster testified that the conversion of wetland to upland also had an impact on interstate commerce. Therefore, the destruction of the Pine River wetlands had an effect on interstate commerce.

6. The Discharge of Pollutants

The evidence clearly showed that construction work at the Pine River site was performed by defendant Prodo, Pat's Gradall, Bilacic Trucking, Inc., Three-S, and Fisher Contracting. The parties have stipulated that this work was generally directed by Mr. Rapanos.

The work performed at the Pine River site consisted principally of ditch construction and ditch cleaning (with associated spreading of material removed from ditches), road construction, and tree and brush clearance. Bilacic Trucking's work at the Pine River site consisted of clearing roads and ditching with an excavator, and removing trees and stumps

from 1992 to 1994. Material from ditching was spread on the road, spread on adjacent wooded lots, or temporarily mounded and thereafter spread out with a bulldozer. Bilacic cleared existing ditches and excavated new ones at the Pine River site.

Pat's Gradall began working in 1992 and used an excavator, a scraper and a loader to clear roads. During 1995 and 1996, Pat's Gradall also dug ditches. Three-S's work consisted of making and clearing roads through the property. Beginning in 1992, Prodo excavated, built roads and dug ditches, cleared roads, spread dirt and pushed trees with a bulldozer and with an excavator.

In October 1992, Dodgers observed that sand had been pushed into forested wetland areas adjacent to newly constructed roads. He also observed an area away from the roads, near the property line, where fill had been placed right up to the property line and undisturbed wetlands remained on the other side of the line. In December 1993, Dodgers observed that additional ditches had been dug, additional roads had been constructed, and additional fill had been spread adjacent to the roads. The ditch and road construction proceeded concurrently.

Plaintiff's Exhibit 75 fairly reflects the times that work was performed and the money that was spent as it relates to construction activity at the Pine River site. The evidence shows that from July 1992 to April 1997, Pat's Gradall, Bilacic Trucking, Fisher Construction, and Prodo were paid over $463,000 for earth moving work.

Dr. Willard testified that the Pine River site, 15 acres of wetlands were lost to the lateral movement of soils between April 1992 and 1997. The locations of these lost wetlands are shown on Plaintiff's Exhibit 134(m). The court specifically adopts Dr. Willard's conclusions as to the extent and location of wetlands lost at the Pine River site.

Soil data also show the existence of fill in areas that Dr. Willard identified as wetlands. Dr. Willard testified that the fill he observed could not be solely attributed to incidental fallback.

7. The Responsible Persons at the Pine River Site

The work performed by the contractors indicated above was conducted, authorized, contracted or paid for by one or more defendants, and was generally directed by Mr. Rapanos. The parties have stipulated that work at the Pine River site was accomplished pursuant to a plan drawn up by Mr. Rapanos and Ayres Associates. Mr. Rapanos generally directed the work performed by Prodo at the Pine River site, with some oversight by Jeffrey Brown, who was employed by Prodo. Mrs. Rapanos owned all of the site except for the "Bailey parcel" from 1990 to 1996. Pine River Bluffs Estates has owned all of the site, including the Bailey parcel, since 1996, except for the few lots that have been sold to third parities. In addition to owning most of the Pine River site from 1990 to 1996, Mrs. Rapanos held herself out to state regulators as the owner of the site. Further, Mrs. Rapanos, as president of Pine River Bluff Estates, Inc., signed contracts for work to be done at the Pine River site by Pat's Gradall.

No permit was requested for the work at the Pine River site. Although the MDNR sent a cease and desist order to Mrs. Rapanos on October 15, 1992, this order was never complied with, and additional construction work was done at the site after the order was sent.

D. The Freeland Site

Unlike at the Salzburg, Hines Road and Pine River sites, the government failed to prove by a preponderance of the evidence that any wetlands existed at the Freeland site at any time relevant to this lawsuit. While there was some evidence

of wetland vegetation, there was little evidence of hydric soils at this site. Dr. Willard assumed the presence of hydric soils from the presence of wetland hydrology and hydrophytic vegetation and based on the county soil survey. However, this assumption proved to be incorrect. William Parker actually examined the soils at this site and found them to be non-hydric. Dr. Willard acknowledged the "lack of firm field confirmation" as to this site. In fact, the Williamson investigation, which is attached to Dr. Willard's report, indicates that none of the three wetland criteria could be documented at this site in June 1997. Particularly due to the lack of evidence of hydric soils, the court is not persuaded that the Freeland site contained any wetlands. Accordingly, it is not necessary for the court to recite the evidence concerning the construction activities at this site or the persons responsible therefor.

E. The Mapleton (Tittabawassee River) Site

As at the Freeland site, plaintiff failed to prove by a preponderance of the evidence that all three criteria of the three-parameter test were met at the Mapleton site. While there was evidence of wetland vegetation at this site, the evidence regarding the presence of hydric soils and the necessary hydrology was lacking.

Plaintiff's evidence of hydric soils was based on a small number of samples taken in 1992 by William Leiteritz, an inspector with the U.S. Army Corps of Engineers. Defendants' expert, William Parker, made 15 borings. Hydric soils were found at only two locations, non-hydric soils were found at eleven locations, and the hydric/non-hydric status of the other two could not be determined. On this record, the court is not convinced that the soil criterion of the three-parameter test is met.

Evidence of sufficient wetland hydrology was also lacking at this site. Plaintiff's expert, Dr. Willard, relied on data collected by Williamson. Williamson, in turn, found wetland hydrology at only four of nine sample points. And at three of these four points, Williamson relied on soil survey information in concluding that wetland hydrology was present, since direct "hydrology indicators were lacking." However, Parker indicates in his report that the soil survey is inaccurate, as it is inconsistent with the data from his actual borings and inspection of the ditch banks. Parker also indicates that data collected from monitoring wells shows that the ground water levels at this site in 1996, 1997 and 1998 were insufficient to satisfy the hydrology criterion.

Because the court is not persuaded that either the soils or the hydrology criteria were met at the Mapelton site, it is not necessary to recite the evidence concerning the construction activities at this site or the persons responsible therefor.

V. Stipulations Regarding EPA Administrative Orders

The parties have stipulated to the following facts:

1. On May 31, 1991, the United States Environmental Protection Agency ("EPA") issued to defendant John Rapanos an Administrative Compliance Order "1991 AO") pursuant to section 309(a) of the CWA, 33 U.S.C. §1319(a), regarding alleged violations of the CWA at the Salzburg site. The 1991 AO, which Mr. Rapanos Received, directed Mr. Rapanos to (1) immediately cease further discharges of pollutants into the wetlands identified in the 1991 AO; (2) submit to EPA written certification of his intent to comply with the 1991 AO; (3) submit restoration plan to EPA; (4) commence restoration of the alleged wetlands; and (5) submit to EPA written certification that the alleged wetlands had been restored.

2. On May 31, 1991, EPA issued to defendant John Rapanos an Administrative Information Request ("1991 IR") pursuant to section 308(a) of the CWA, 33 U.S.C. § 1318(a), concerning the Salzburg, Mapelton and Freeland sites, and an additional site which is not the subject of this action. The 1991 IR, which Mr. Rapanos recieved, directed Mr. Rapanos to provide certain information to EPA.

3. On June 12, 1991, Mr. Rapanos responded in writing to EPA's 1991 AO and 1991 IR. Although Mr. Rapanos acknowledged personal ownership of the three sites, he did not (1) cease using mechanical equipment at the site; (2) submit a restoration plan to EPA; (3) commence restoration of the alleged wetlands; (4) submit to EPA written certification that the alleged wetlands had been restored; or (5) submit to EPA all of the information and documents requested in the 1991 IR.

4. On November 13, 1991, EPA notified a representative of Mr. Rapanos that Mr. Rapanos was in non-compliance with the terms of the 1991 AO and that his continued non-compliance would result in a referral to the U.S. Department of Justice.

5. On September 22, 1997, EPA issued to Mr. Rapanos, Mrs. Rapanos, Prodo, Inc., Rolling Meadows Hunt Club and Pine River Bluff Estates, Inc. another AO ("1997 AO") pursuant to section 309(a) of the CWA, 33 U.S.C. §1319(a), concerning additional alleged violations of the CWA at the Hines Road and Pine River sites, as well as at another site that is no longer at issue in this action. The 1997 AO, which was received by the respondents, purported to require respondents to (1) Immediately cease further discharges of pollutants into our conducting any activities which would negatively impact the potential for restoration at the alleged wetlands identified in the 1997 AO; (2) submit to EPA written certification of their intent to comply with the 1997 AO; (3) submit a restoration

plan for each of the sites to EPA; (4) commence restoration of the alleged wetlands at each of the sites; and (5) submit to EPA written certification that the alleged wetlands at each site had been restored.

6. While the respondents replied to the 1997 AO, none of the respondents (1) immediately ceased the use of mechanical equipment at the subject sites or ceased conducting activities impacting the sites; (2) submitted to EPA written certification of their intent to comply with the 1997 AO; (3) submitted a restoration plan for each of the sites to EPA; (4) commenced restoration of the alleged wetlands at each of the sites; or (5) submitted to EPA written certification that the alleged wetlands at each site had been restored.

VI. Conclusions of Law Regarding Liability

1. This court has jurisdiction over the defendants and the subject matter of this action pursuant to 28 U.S.C. §§1331, 1345, and 1355, and 33 U.S.C. § 1319(b). Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and 33 U.S.C. § 1319(b).

2. Three of the five sites at issue in this case contained wetlands, prior to the construction activities alleged in this case. The Salzburg site contained 28 acres of wetlands, as shown on plaintiff's Exhibit 124(j). The Hines Road site contained 64 acres of wetlands, as shown on plaintiff's Exhibit 131(j). The Pine River site contained 49 acres of wetlands, as shown on plaintiff's Exhibit 134(k). The existence of wetlands was not established at the Freeland and Mapleton sites.

3. The wetlands at the Salzburg, Hines Road, and Pine River sites were within federal jurisdiction, both because they were "adjacent to other waters of the United States," see 33 C.F.R. § 323.2(a)(7) and 40 C.F.R. § 230.3(s)(7), and because

the destruction of these wetlands has had an adverse effect on interstate commerce. In light to the evidence of surface water connections, the wetlands the court has found to exist in this case are "adjacent" within the meaning of 33 C.F.R. § 323.2(a)(7).

4. It is not disputed that the Kawkawlin, Tittabawassee and Pine Rivers are waters of the United States. The demonstrated connections between the wetlands at the Salzburg site and the Kawkawkin River, between those at the Hines Road site and the Tittabawassee River, and between those at the Pine River site and the Pine River, establish that the sites contain wetlands that are adjacent to waters of the United States, within the meaning of 33 C.F.R. §§323.2(a)(7), (c).

5. There is also federal regulatory jurisdiction over these wetlands because their use, degradation and destruction affect interstate commerce. The "interstate commerce" requirement was also met in this case because these wetlands provided actual habitat for migratory bird species.

6. Pollutants were discharged from a point source into 22 acres of wetlands at the Salzburg site, as shown on plaintiff's Exhibit 124(n); 17 acres of wetlands at the Hines Road site, as shown on plaintiff's Exhibits 131(1) and 131(n); and 15 acres of wetlands at the Pine River site, as shown on plaintiff's Exhibit 134(m).

7. Defendants have asserted that their discharges, if any, were "incidental fallback" and thus excluded from the reach of CWA regulation. The record is clear that the activities identified by plaintiff are not incidental fallback. Defendants' activities involved the intentional deposition of inches, and often feet, of soil. In contrast to the soil that is disturbed when dirt is shoveled, or the back spill that comes off a bucket and falls back into the same place from which it was removed,

defendants' lateral movement of soils and placement of soils constitutes deliberate redeposition of materials in other locations within the sites. The equipment used, the amount of money spent, the observations of witnesses, the results of soils investigations, and the nature of the work, demonstrate that the observed wetland loss at each of the sites occurred as a result of the discharge of pollutants and/or fill material, and can not be attributed to incidental fallback.

8. Mr. Rapanos controlled and was responsible for the discharges at each of the three sites where the court has found wetlands to exist. Mr. Rapanos also owned the Salzburg site during the relevant times.

9. Prodo owned the Hines Road site during the relevant times, and controlled and was responsible for the discharges at that site.

10. Mrs. Rapanos and PRBE owned the Pine River site during the relevant times, and controlled and were responsible for the discharges at that site.

11. None of the defendants had a permit for these discharges. Therefore, each defendant has violated section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging pollutants from a point source during the construction activities detailed above into waters of the United States without a permit issued under section 404(a) of the CWA, 33 U.S.C. § 1344(a).

12. Specifically, Mr. Rapanos violated section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging pollutants from a point source into waters of the United States at the Salzburg site, the Hines Road site, and the Pine River site, without a permit issued under section 404(a) of the CWA. Mr. Rapanos is liable for the discharge of pollutants into 22 acres of wetlands

at the Salzburg site, 17 acres of wetlands at the Hines Road site, and 15 acres of wetlands at the Pine River site.

13. Prodo violated section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging pollutants from a point source into 17 acres of waters of the Unites states at the Hines Road site, without a permit issued under section 404(a) of the CWA.

14. Mrs. Rapanos violated section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging pollutants from a point source into 15 acres of waters of the United States at the Pine River site, without a permit issues under section 404(a) of the CWA.

15. PRBE violated section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging pollutants from a point source into 15 acres of waters of the United States at the Pine River site, without a permit issued under section 404(a) of the CWA.

16. As long as unlawful fill remains in place at a site, there is a "continuing violation" of the CWA. Each day the pollutant remains in wetlands without a permit constitutes an additional day of violation.

17. The failure to follow the requirements of an administrative order or information request issued under sections 308 and 309 of the CWA, 33 U.S.C. §§ 1318 and 1319, constitutes a violation of the CWA.

18. Mr. Rapanos violated the May 31, 1991, Administrative Compliance Order concerning the Salzburg site (1991 AO) by failing to (1) cease using mechanical equipment at the site, (2) submit a restoration plan to EPA, (3) commence restoration of the wetlands, or (4) submit to EPA written certification that the wetlands had been restored.

19. Mr. Rapanos violated the May 31, 1991, Administrative Information Request (1991IR) by failing to submit to EPA all of the information and documents requested concerning the Salzburg site.

20. Mr. Rapanos, Mrs. Rapanos, Prodo, Rolling Meadows Hunt Club and PRBE each violated the September 22, 1997, Administrative Order (1997 AO) concerning the Hines Road and Pine River sites by failing to (1) immediately cease the use of mechanical equipment at the subject sites or cease conducting activities impacting the sites, (2) submit to EPA written certification of their intent to comply with the 1997 AO, (3) submit a restoration plan for these sites to EPA, (4) commence restoration of the wetlands at these sites, or (5) submit to EPA written certification that the alleged wetlands at these sites had been restored.

/s/
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: MAR 22 2000
Detroit, Michigan

COPY SENT TO: Robert H. Foster, Esq.
Julie A. Keil, Esq.
David E. Dearing, Esq.
LaJuana Wilcher, Esq.

No. 03-1489

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN A. RAPANOS, ET AL., Defendants-Appellants.	)	Filed Nov. 02, 2004 ORDER

BEFORE: SILER and GIBBONS, Circuit Judges; and REEVES,[1] District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

[1] Hon. Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.